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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

MARY JANE JENKINS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Racketeer Influenced and Corrupt Organizations Act ("RICO") definition of "pattern of racketeering activity" void for vagueness, overbroad and unconstitutional as applied to a Defendant engaged in the distribution of material protected by the First Amendment and charged only with predicate acts of dealing in obscene matter so that no restraining order may be issued under the statute.

2. Is the RICO definition of "enterprise" void for vagueness, overbroad and unconstitutional as applied to a Defendant engaged in the distribution of material protected by the First Amendment and charged with predicate acts of dealing in obscene matter so that no restraining order may be issued under the statute.

3. Do the RICO mandatory forfeiture provisions, applicable to Defendant's interest in an enterprise under 1963(a)(2) violate the First Amendment so that no restraining order may be issued directed to all Defendant's interest in ten (10) unindicted bookstores in Alabama, Tennessee, Louisiana, and Abilene, Texas, grossing approximately $4,000,000 annually, a note balance of approximately Four Hundred Thousand Dollars ($400,000) for sale of the bookstores in Houston, Texas, and a home worth approximately $725,000, solely on the basis of an Indictment charging nine (9) allegedly obscene magazines shipped to Houston over a three year period, and display of allegedly obscene video tapes in two (2) bookstore arcades in Houston for four (4) weeks?

4. Do the RICO mandatory forfeiture provisions under 1963(a)(1) and (a)(3), applicable to proceeds and interest and 1963(a)(2) as a source of influence, violate the First Amendment so that no restraining order may be issued directed to Defendant's interest in a residence worth Seven Hundred Twenty-Five Thousand Dollars ($725,000), ten (10) unindicted adult bookstores in

Alabama, Tennessee, Louisiana and Abilene, Texas, and a note balance of approximately Four Hundred Thousand Dollars ($400,000) for the sale of bookstores in Houston, Texas, solely on the basis of an Indictment charging nine (9) alleged obscene magazines shipped to Houston and display of alleged obscene video tapes in two bookstore arcades for four (4) weeks.

LIST OF PARTIES

Petitioner Mary Jane Jenkins and the United States of America as Respondent, are the only parties to this action. None of the other Defendants charged in the Indictment filed a Motion to Dissolve the Restraining Order, although the Court's rulings on forfeiture or the constitutionality of RICO as applied to First Amendment activities would be a benefit to them in any further proceedings in the lower court

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OPINIONS BELOW

The opinion of the Court of Appeals reported as *United States of America v. Mary Jane Jenkins*, 974 F.2d 32 (5th Cir. 1992), is reproduced as Appendix "A" to this Petition. The District Court's opinion and order is not reported and is reproduced as Appendix "B." The unreported Restraining Order of the District Court is reproduced as Appendix "C."

JURISDICTION

The United States Court of Appeals for the Fifth Circuit, issued its opinion in this case on October 5, 1992. Petitioner has filed this Petition within the time permitted by law. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provision and statutes are reproduced as Appendix "D."

United States Constitution, Amendment 1
United States Code:
18 U.S.C. § 1961(1)(4)(5)
18 U.S.C. § 1962(c)(d)
18 U.S.C. § 1963

STATEMENT OF THE CASE

This case presents companion issues to those raised in *Alexander v. United States, cert. granted,* ____ U.S. ____, 112 S. Ct. 3024 (June 29, 1992). At issue in *Alexander* is whether the RICO forfeiture provisions (18 U.S.C. 1963(a)) violate the First Amendment when applied to confiscate all of the property of a chain of bookstores, video stores and theaters on the basis of seven obscene video tapes and magazines.

One issue here presented is whether a restraining order may be issued because of minimum receipts from the sale of nine (9) magazines over a three (3) year period in Houston and display of videos for four (4) weeks in an arcade at two (2) bookstores in Houston in support of the mandatory forfeiture requested under 18 U.S.C. § 1963(a)(2) of all of Defendant's interest as the alleged owner and operator of the ten (10) remaining bookstores in Tennessee, Alabama, Louisiana, and Abilene, Texas, a home in St. Louis, Missouri worth approximately $725,000 and owner of a note with a balance of approximately $400,000 still due on the sale of the four (4) bookstores in Houston and three (3) bookstores elsewhere in January 1989. The restraining order prohibits the transferring, encumbering or selling or otherwise disposing of the assets of all ten (10) remaining bookstores in Memphis, Tennessee (4 bookstores), Kenner, Louisiana (1 bookstore), Birmingham, Alabama (2 bookstores), and Abilene, Texas (1 bookstore), which gross approximately four million dollars ($4,000,000) annually because of a

RICO charge of dealing in obscene matter, where the alleged predicate and racketeering acts occurred only in Houston, Texas. The alleged obscene materials were received and sold or displayed only in the bookstores in Houston. The restraining order also prohibits the receipt of approximately Four Hundred Thousand Dollar ($400,000) still due from the sale of the three (3) bookstores in other cities in Texas and the four (4) bookstores in Houston in January 1989 and disposal of the home or proceeds. The obscenity charges involve nine (9) magazines which would generate sale proceeds of approximately One Hundred Dollars ($100) and arcade proceeds at two (2) of the stores in Houston for four (4) weeks, which proceeds probably amounted to several thousand dollars.

The Motion to Dissolve filed by Petitioner also challenged the Restraining Order because RICO "pattern of racketeering activity" and "enterprise" were void for vagueness and overbroad when applied to a Defendant engaged in the distribution of material protected by the First Amendment and charged under 18 U.S.C. 1962(c). The issues are ripe for determination because the Government has seized funds and has in effect a restraining order in multiple Federal jurisdictions involving adult bookstores operating in Tennessee, Louisiana, Alabama, as well as Abilene, Texas, although all of the obscenity charges in the RICO Indictment relate to the bookstores once owned and operated in Houston, Texas, but sold in 1989 some two years, three months before the Indictment.

The Defendant Jenkins was indicted on April 9, 1991, with five (5) other individual Defendants, on a RICO charge of conducting an enterprise through a pattern of racketeering activity in violation of § 1962(c) and conspiracy under § 1962(d). The Government immediately moved for a Restraining Order which was originally denied by District Judge Lynn Hughes on April 9, 1991. An amended *ex parte* Government's Motion for a Restraining Order (Appendix E) was granted by District Judge Kenneth M. Hoyt on April 10, 1991.

Petitioner moved to dissolve the Restraining Order because the mandatory RICO forfeiture provisions were overbroad and uncon-

stitutional as applied to bookstores engaged in the distribution of material protected by the First Amendment. If the mandatory RICO forfeiture provisions which require forfeiture of Defendant's interest in the entire enterprise violate the First Amendment when applied to protected material after conviction, then the forfeiture provisions are likewise invalid to support a Restraining Order against Defendant and the unindicted corporations operating the ten (10) remaining adult bookstores in other cities and states.

The Court of Appeals and the District Court denied the Motion to Dissolve the Restraining Order. The Court of Appeals noted this Court's decision granting Certiorari in *Alexander* and stated, "Wisdom dictates that we await the Supreme Court's teaching."

The Restraining Order was issued in support of the Government's forfeiture allegations. The Indictment alleges Defendant Jenkins to be in total and exclusive control of the unindicted corporations which the Court of Appeals characterized as alleged to be "an integral part of the criminal enterprise." Pertinent portions of the Indictment are attached as Appendix "F."

The forfeiture allegations seek forfeiture of all of the assets of the sixteen (16) unindicted corporations alleged to be owned by Jenkins, the bank accounts belonging to the various corporations, money seized in the execution of a search warrant in June 1988 of approximately $53,000, Jenkins' automobile and her residence having a value of approximately $725,000. By seeking forfeiture of Defendant Jenkins' interest in the enterprise under § 1963(a)(2), the Government seeks to strip Jenkins of all assets reducing her to a state of poverty. In addition, the Government also seeks proceeds from the sale of the obscene matter under forfeiture Section 1963(a)(1) and (3), as well as any assets which were a source of influence under 1963(a)(2).

Since Defendant Jenkins is alleged as the real owner of all of the assets of the corporations, the forfeiture allegations seek all of the assets of the unindicted corporations operating in other states, not in any way related or connected to the obscenity predicate acts in

Houston. The note for the sale of the four (4) stores in Houston, and three other stores in Texas, had an outstanding balance of approximately $400,000 which was to be paid in weekly payments of $3,850 per week. Said payments under the Restraining Order are therefore denied Defendant.

The obscenity predicate acts and racketeering acts charge nine (9) instances of transportation of obscene material in interstate commerce from either Cleveland, Ohio or Los Angeles, California, to Houston, Texas, and one act dealt with promotion of obscene material under the Texas statute, § 43.23 by sale of four (4) magazines.

The charges against the four (4) bookstores in Houston are the following. Doc Johnson's Arcade received one (1) obscene magazine through interstate commerce in March 1987. Bellair News received four (4) interstate shipments of one obscene magazine each in March 1986, June 1986, November 1986, and July 1987. Diner's News and Arcade News are alleged to have received and displayed in video arcades a number of video tapes during the four (4) week period of June 7-28, 1988. In addition, Diner's News is charged with the promotion of four magazines under the Texas statute by a sale in July 1988. Diner's News is a retail establishment and the retail sale of magazines in Texas does not provide for a penalty in excess of one year and is not a proper racketeering act under RICO. A Motion to Dismiss this racketeering act is pending.

There are no prior convictions alleged in any of the adult bookstores in Houston or in the other bookstores operating in the other states of Tennessee, Alabama and Louisiana. There are no allegations of interstate transportation of obscene material between the bookstores in other states to Houston, or from Houston to the other bookstores alleged to be owned and controlled by Jenkins.

The criminal enterprise charged with conducting a pattern of racketeering (1962(c)) and conspiring (1962(d)) consist not only of Defendant Jenkins and the five (5) individual Co-Defendants, but also the sixteen (16) unindicted corporations allegedly owned and

controlled by Jenkins. These were two foreign holding companies (Mustatara and Jabar, Ltd.) and fourteen (14) domestic corporations alleged to be connected directly or indirectly with the operation of the ten (10) remaining adult bookstores and video stores in Tennessee, Alabama, Louisiana and Abilene, Texas, as well as the stores in Houston, where the obscenity predicate acts took place.

The RICO enterprise and the RICO conspiracy are alleged to have begun in June 1978, prior to the time the RICO statute was extended in 1984 to dealing in obscene matter but no predicate acts are alleged until 1986. Defendant Jenkins had a unique relationship with the United States Government, the Department of Justice and the Internal Revenue Service, which is partially summarized in the Order of March 16, 1981, of the United States District Court, Northern District of Georgia, in *Fidelity Equipment Leasing, et al. v. United States of America*, No. C-78-1118A. The Defendant had purchased approximately nine (9) bookstores from Fidelity over the period 1979 through 1981, with the knowledge of the Internal Revenue Service. The Defendant had been employed at Fidelity and worked under the supervision of the Court and the Internal Revenue Service. Subsequently, in 1982, there was an agreement entered into between the Internal Revenue Service and the Defendant under a power of attorney granted by Jabar, Ltd. and Mustatara Investments, N.V., the foreign corporations listed in the Indictment. Pursuant to this Agreement, the adult bookstores paid the Internal Revenue Service approximately Three Hundred Thirty-Three Thousand Dollars ($333,000) in installments of Twenty-Thousand Dollars ($20,000) per month, with the last payment in October 1983.

Each of the unindicted domestic corporations previously operating in Houston and the unindicted corporations operating the bookstores in other states were separate entities with their own bank account or accounts, in which sales and receipts from the particular adult bookstore were deposited. Accounts payable, salaries, taxes and other expenses were paid from the respective bank accounts of each corporation.

Each separate domestic corporation operating a bookstore or bookstores filed its own Federal corporate income tax return and its own state sales tax and other state tax returns. Federal income tax returns on each corporation listed the stock owned 100% either by Mustatara Investments or Jabar, Ltd. The adult bookstores operating in Houston were all owned by Mustatara Investments. Phoenix & Associates and its predecessors did the accounting and maintained the books of the various corporations, paying their bills from each corporations' bank accounts and performing management functions.

The Court of Appeals in affirming the District Court, refused to rule on Petitioner Jenkins' principal arguments that both RICO substantive prohibitions and its forfeiture and Restraining Order provisions were unconstitutional as applied to those charged with dealing in obscene material. It would not consider the facial challenges without the benefit of a complete record. If this were so, no Motion to Dismiss an Indictment could be granted on constitutional grounds without a trial, conviction and mandatory forfeiture.

The RICO statute does not permit a Court to withhold forfeiture during the appeal of a conviction. The Court of Appeals likewise incorrectly holds that as to allegedly obscene materials, the extent of the constitution's protection may vary depending upon the circumstances. The First Amendment should be uniformly interpreted that the forfeiture provisions of § 1963(a)(2) requiring all untainted interests of a defendant in an enterprise distributing materials protected by the First Amendment to be forfeited is invalid and that the RICO "pattern of racketeering activity" and "enterprise" are void for vagueness as applied to persons engaged in the distribution of material presumed protected by the First Amendment.

The District Court and the Court of Appeals have left intact the Restraining Order to preserve assets which should not be subject to forfeiture because of the unconstitutionality of these provisions as applied to First Amendment activities.

The Government seeks forfeiture of the residence of the Defendant as an interest under 1963(a)(1) or proceeds under (a)(3) or as

a source of influence under 1963(a)(2) as well as an interest in the enterprise under 1963(a)(2). The forfeiture allegations state the United States seeks forfeiture, including but not limited to the Defendant Jenkins' *total interest* in the assets not only in the corporations, but also the residence identified in paragraph 3(E). The residence was purchased on June 30, 1987, for Four Hundred Seventy-Five Thousand Dollars ($475,000). Prior to that time the Indictment alleges only transportation of four (4) obscene magazines, three (3) of which had been sold prior to the home purchase, so that the proceeds would be minuscule. Two (2) allegedly obscene magazines were additionally sold in July 1987, and four (4) under the Texas statute charge of July 1988. In addition, there was in June 1988 four (4) weeks of video arcade receipts in two (2) of the alleged seventeen (17) bookstores operating at the time. All seventeen (17) bookstores sold magazines and videos as well as had arcades. The residence had an outstanding contract of sale in 1992 for Seven Hundred Thirty-Seven Thousand Dollars ($737,000) which has expired.

The sale in January 1989 of the four (4) bookstores in Houston and the three (3) other bookstores in Texas had a sales price of approximately One Million Dollars ($1,000,000). At the time the restraining order was issued there was an outstanding balance due of approximately Four Hundred Thousand Dollars ($400,000) payable in installments of Three Thousand Eight Hundred Fifty Dollars ($3,850) per week. The restraining order prohibited the Defendant and the corporations from receiving such payments. The effect of the restraining order is to seize the Four Hundred Thousand Dollars ($400,000) remaining installment payments on the basis of nine (9) obscene magazines and four (4) weeks of arcade showings of videos in two (2) of the seventeen (17) bookstores, the proceeds of which cannot amount to more than several thousand dollars. This is in addition to the restraints of the disposal of any of the assets of the remaining ten (10) bookstores operating in locations other than Houston, Texas.

REASONS FOR GRANTING THE WRIT

1. THERE IS AN IMPORTANT NEED TO CLARIFY THE DEFINITION OF PATTERN OF RACKETEERING ACTIVITY AS APPLICABLE TO BUSINESSES DISTRIBUTING SEXUAL MATERIAL.

This case presents a First Amendment challenge to the definition of "pattern of racketeering activity." This Court noted in *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L.Ed.2d 195 (1989), that the development of limits on the relationship and continuity concepts must await future cases absent a decision by Congress to revisit RICO to provide clearer guidance as to the Act's intended scope. This First Amendment challenge provides the Court the opportunity to set the outer boundaries of a RICO pattern. This is particularly important because of principles established by this Court concerning the First Amendment which presumed that material consisting of books, videos, films and magazines are protected expression.

Vagueness challenges to RICO since *H.J.* have been outside the First Amendment context. No Defendant had standing to raise the vagueness challenge except as the statute was applied to his or her conduct. The Circuits which have revisited RICO since *H.J.* have construed the hardcore type of RICO conduct involving organized crime or political corruption. In all of these cases, the Courts have determined that the vagueness challenge need only be examined under the facts of the particular case.[1] This is an example of a "future case" envisioned by the Court in which the Court would probe the outer limits of RICO pattern,

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[1] The First, Second, Third, Seventh and Ninth Circuits have all rejected vagueness claims since *H.J.* The conduct, however, related to hardcore organized crime or political corruption type of cases. *U.S. v. Dischner*, 974 F.2d 1502 (9th Cir. 1992); *U.S. v. Van Dorn*, 925 F.2d 1331 (11th Cir. 1991); *U.S. v. Glecier*, 923 F.2d 496 (7th Cir. 1991); *U.S. v. Coiro*, 922 F.2d 1008 (2d Cir. 1991); *U.S. v. Woods*, 915 F.2d 854 (3d Cir. 1990); *U.S. v. Pungitore*, 910 F.2d 1084 (3d Cir. 1990); and *U.S. v. Angiulo*, 897 F.2d 1169 (1st Cir. 1990).

as well as enterprise definition to determine whether or not the definitions are vague as applied to a Defendant charged solely with the distribution of material protected by the First Amendment and the predicate acts relate only to dealing in obscene matter.

The unknown *outer limits* of RICO pattern, when applied to legitimate businesses, distributing videos, magazines and books presumed protected by the First Amendment allows the prosecution and the trial court, not Congress, to legislate the meaning of that element of RICO. Neither this Defendant nor any other Defendant engaged primarily in distribution of material protected by the First Amendment, could anticipate that she was violating the Government's expanded version of RICO or conceivably have known that the few isolated transactions alleged would subject her to the racketeering statute. There is no question that organized crime and political corruption activities have been found within the RICO statute's core. First Amendment activity does not involve core RICO. The vagueness problem is exacerbated by the factors of a lack of a definition of the outer boundaries of the RICO pattern, either by Congress or this Court, and the principles of the First Amendment which presume that materials are protected and not obscene.

While *H.J.* was a civil suit, the allegations were of political corruption which has been held by the Third and Ninth Circuits to be hardcore RICO violations. *U.S. v. Dischner*, 974 F.2d 1502 (9th Cir. 1992), involved repeated soliciting and acceptance of bribes in connection with public contracts. The Court found it was obvious that bribes and kickbacks on public contracts is criminally culpable and that repeated over time such activities feed on themselves so as to become a pattern, no matter what concerns may exist about RICO's reach in other cases. Similarly, decided in the Third Circuit was *U.S. v. Woods*, 915 F.2d 854 (3d Cir. 1990).

The majority in *H.J.* ". . . assumes that there is something to a RICO pattern *beyond* simply the number of predicate acts

involved" (emphasis in original), 109 S. Ct. at 2899-2900. A pattern of racketeering activity requires a prosecutor to prove that the racketeering predicates are related and that they amount to or pose a threat of continued criminal activity. *H.J.* defines the test for pattern as "continuity plus relationship." Relationship of predicate acts is established if the criminal acts have the same or similar purposes, results, participants, victim, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.

The concurring opinion in *H.J.* also stated that pattern was meant to import some requirement beyond the mere existence of multiple predicate acts. If that were not the case, the concept of pattern would have been unnecessary and the statute could simply have attached liability to multiple acts of racketeering activity. 109 S. Ct. at 109.

When applied to First Amendment activities such as the distribution of videos, books and magazines presumed protected by the First Amendment, RICO does essentially grant unbridled discretion to prosecutors and juries and likewise affords no fair notice of what conduct it prohibits. The Defendants are engaged in the distribution of magazines, books and films which are traditional forms of expression protected by the First Amendment. Not only Defendants, but others, whose expression is constitutionally protected may refrain from exercising those rights for fear of criminal sanctions from a statute susceptible to application to protect expression. The RICO law can be criticized as stated in *U.S. v. Reece*, 92 S. Ct. 214 (1876), which is quoted in *Kolender v. Lawrence*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), as follows:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

There is no helpful legislative history about adding to racketeering activity the "dealing in obscene matters" nor any legislative history as to what effect the First Amendment has in relation to a pattern of racketeering activity. The initial version of the Comprehensive Crime Control Act of 1984 was introduced by Senator Thurmond on August 4, 1983, as Senate Bill 1762. Senator Jesse Helms on January 30, 1984, proposed the addition of Amendment No. 2682 adding "dealing in obscene matter" to Section 1961(1). This Amendment was accepted by the majority leader and the minority leader of the Senate without objection or argument and was adopted by agreement. Of all of the numerous written reports and studies addressing criminal control bill, there is no discussion of this Amendment. The only comments was a short speech of Senator Helms and his entry into the Congressional Record of magazine articles from the *Los Angeles Times*, *Parade* and *Calendar*, together with a portion of the 1976 report of a task force on Law Enforcement Assistance Administration. There are no reports of any congressional committee on the possible effects or constitutional applications of the adoption of this Amendment. There are at least ten (10) related reports considering various aspects of this crime bill. The Senate Bill, with the Helms as well as all other Amendments was passed by the Senate on February 2, 1984. The House did not consider any crime legislation until September 25, 1984, when Rep. Dan Lundgren moved to send the Fiscal 1985 Continuing Appropriation Resolution No. 648 to the Appropriations Committee to attach House Bill 5963, which was similar to the Senate crime bill and to return the full measure to the House. The funding resolution with the crime bill attached was returned to the House floor and passed the same day and on October 11 the Senate passed House Joint Resolution 648 with the attached crime bill which was signed into law on October 12, 1984, by President Reagan.

The Act is entitled "Continuing Appropriations, 1985 - Comprehensive Crime Control Act of 1984" and is Public Law 98-

473. The entire Act is 363 pages in the *U.S. Code Congressional and Administrative News*. The Committee Reports total over 500 pages. In none of them is there any consideration, discussion or explanation of the implications of adding obscenity as a RICO predicate offense.

This Court in *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S. Ct. 916 (1989), held a pre-trial seizure invalid even though the bookstore had 39 prior criminal convictions for obscenity. The elements of a RICO violation other than predicate acts, remain to be established which were that these violations by the corporations and employees established a pattern of racketeering activity. *See*, 109 S. Ct. at 929. *H.J.* holds that the concept of pattern must have meaning since the statute did not simply attached liability to multiple acts of racketeering activity. We asked the Court to consider the vagueness challenge as applied to a Defendant engaged normally in the distribution of material presumed protected by the First Amendment.

If RICO pattern of racketeering activity is unconstitutionally vague as applied to this Defendant, the restraining order must fall. The test of continuity and relationship established by the Court in *H.J.* does not solve the vagueness problem for a Defendant whose primary activity is the operation of a theater or a bookstore which sells magazines and videos, rents videos, and displays videos in arcades within the bookstores.

A. The Continuity Requirement of Pattern is Vague When Applied to First Amendment Activities and is in Conflict with First Amendment Decisions in Many Circuits.

The natural, legitimate and legal purpose of a bookstore, video store or motion picture theater is the distribution of books, films, videos and magazines which are presumed to be protected by the First Amendment and not obscene.

There is something to a RICO pattern beyond simply the number of predicate acts involved. Pattern is impermissibly

vague for First Amendment activities when based on the test that continuity over a closed period of time is established by proving a series of related predicates or the threat of continuity is established. First Amendment principles have established that each and every video, film or magazine must be judged individually. Films or magazines may contain similar sexual conduct but each is still presumed to be protected and not obscene. There can be no continuity. Since each and every book, magazine, motion picture or video is judged individually, the distribution of one sexually explicit and obscene item does not pose a threat of continued activity. The same sexual acts in one video or magazine may be held not obscene and protected and in another video or magazine may be held to be obscene. Different juries may reach different results on the same film or magazine. The application of local contemporary community standards may have different verdicts in different locations. *See, Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). The fact that one video or magazine may be charged or even found obscene does not establish the threat of continuity because the bookstore remains in the distribution business. Continuity is vague because this Court and numerous circuits and district courts have established that it cannot be presumed that unnamed films or magazines distributed in the future will be obscene.[2]

Even if a single copy of a film may be seized for evidence in a criminal proceeding, the continued exhibition of such film

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[2] Among the many cases which reject an injunction against the exhibition of future unnamed films because of past obscene films are *Parish of Jefferson v. Bayou Landing, Ltd.*, 350 So. 2d 158 (La. 1977); *News Mart, Inc. v. State ex rel Webster*, 561 S.W.2d 752 (Tenn. 1978); *Ranck v. Bonal Enterprises, Inc.*, 467 Pa. 569, 359 A.2d 748 (Pa. 1976); *Fehlhaber v. North Carolina*, 445 F.Supp. 130 (E.D. N.C. 1978); *Mitchem v. State ex rel Schaub*, 250 So. 2d 883 (Fla. 1971); *State ex rel Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *New Riviera Arts Theater v. State ex rel Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); and *Busch v. Projection Room Theater*, 130 Cal.Rep. 328, 550 P.2d 600 (1976), *cert. denied*, 429 U.S. 922, 97 S. Ct. 320 (1976).

cannot be restrained by seizing all available copies of it. Publications may not be taken out of circulation until there has been determination of obscenity. The exhibitor or distributor therefore has the option to continue distribution because there has been no determination of obscenity. *See, Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L.Ed.2d 745 (1973); and *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S. Ct. 1610, 89 L.Ed.2d 871 (1986).

A business primarily engaged in First Amendment activities of distribution or exhibition must be construed as a pattern of *legal* protected activity, and not a pattern of *illegal* activity. Engaging in bribery or political corruption or the numerous other illegal acts that may be a course of business of a legal entity and held to be core RICO activities are not analogous.

Among the decisions rejecting injunction for future films based on past obscenity is *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 100 S. Ct. 1156, 63 L.Ed.2d 413 (1980), affirming *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (1978).

The reasoning of the Fifth Circuit rejected continuity as applied to First Amendment activities. The listing of forbidden sexual acts or acrobatics in an injunction merely begs the question for few people have the omnipotence to determine the advance of a final judicial ruling whether a film is legally obscene. 587 F.2d at 169.

The principle stated by this Court in *Vance*, 100 S. Ct. 1156 at 1159, note 3, is appropriate when considering the vagueness of the continuity test of pattern. The State of Texas, just as the RICO statute, made the mistake of prohibiting future conduct protected by the First Amendment after a finding of undesirable present conduct.

> When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be

'dim and uncertain.' *Bantam Books v. Sullivan*, 372 U.S. 58 at 66,

100 S. Ct. at 1159, n.3.

As this Court recognized in *Ft. Wayne Books v. Indiana*, the state cannot escape the constitutional safeguards of prior cases by merely recategorizing a pattern of obscene violations as racketeering.

It cannot be fair notice to the Defendant that any distribution of materials presumed protected by the First Amendment meets the continuity requirement of pattern merely because the material distributed in the past or to be distributed in the future has sexual content.

B. The Relationship Requirement of Pattern is Vague as Applied to First Amendment Activities.

The relationship test is that the pattern embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events. *See, H.J.*, 109 S. Ct. at 2901. The cases construing relationship have involved political corruption with bribery or kickback schemes, loan sharking and gambling, drug distribution, murder, arson, kidnapping and similar crimes.

There is no criminal *purpose* to the distribution of films or magazines presumed protected by the First Amendment unless the purpose is to sell the magazines or films for money. The *results* are not related such as acts of bribery or arson or some other *core* criminal activity, but the results are that one or more particular magazines or films are found to violate local contemporary community standards and are obscene.

Participants is likewise vague. The participants are not common to one another. One may be a publisher of a magazine and another may be a producer of a video. There may be a number of videos or a number of magazines with each having

different producers or publishers. There may be the same or different national distributors. The magazines or films may be sold from the same stores or from different stores. The expressive material may be sold or rented by different clerks. They may be ordered by different clerks or different persons.

There are no *victims*, obscenity is considered a victimless crime. The *methods of commission* are vague. Is it the sale or rental of a video or the sale of a magazine? Is it the display of a video in an arcade? Is it restricted to the same publisher or same video producer? Is the relationship satisfied by the sale or rental by the same bookstore or of related bookstores under the same corporate or individual ownership? Is the display in a theater the same method as a sale in a bookstore? There are so many questions that the sale or distribution of material protected by the First Amendment is too vague to come under the *relationship* definition established by the Court.

The distribution of material presumed protected by the First Amendment is beyond the outer limits of RICO. The RICO statute needs to be construed by the Court and declared unconstitutional as applied to persons operating under the First Amendment who are charged under the RICO statute as "dealing in obscene matter."

C. Enterprise is Vague or Overbroad and Must Be Restricted.

This Court, in 1981, before RICO was extended to dealing in obscene matter, determined the scope of enterprise in *U.S. v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981). As used in RICO, "enterprise" encompasses both legitimate and illegitimate enterprises. However, the Court explained that while a wholly criminal enterprise comes within the ambit of the statute it did not mean that a "pattern of racketeering activity" is an enterprise. The Government must prove both the existence of an enterprise and the connected pattern of racketeering activity. The enterprise is an entity. In *Turkette*, "enterprise" was an association in fact to distribute drugs. The association in fact

must be for a common purpose of engaging in a course of conduct. "Pattern of racketeering" is, on the other hand, a series of criminal acts as defined by the statute. Importantly, the Court said:

> The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.
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> 101 S. Ct. at 2529.

Interpretation problems arise in connection with First Amendment activities when a group of persons are charged under Section 1962(c) of conducting or participating in an enterprise through a pattern of racketeering activities.

The Seventh Circuit in *U.S. v. Masters*, 924 F.2d 1362 (7th Cir. 1991), discussed the difficult issue of an enterprise. The difficulty is exacerbated in a First Amendment case. *Masters* stated:

> The most difficult issue relating to enterprise and pattern in this case is whether the two are separate. If the 'enterprise' is just a name for the crimes, the defendants commit, or for their agreement to commit these crimes that was charged separately in the conspiracy count, then it would not be an enterprise within the meaning of the statute. *U.S. v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528-29, 69 L.Ed.2d 246 (1981); *U.S. v. Neopolitan*, 791 F.2d 489, 500 (7th Cir.

1986). Otherwise, two statutory elements - enterprise and pattern - would be collapsed into one.

924 F.2d at 1367.

The Petitioner, those alleged to be associated with her, and the unindicted corporations are all alleged to be *in the business of distributing material presumed protected by the First Amendment.* There is no *separate* ongoing organization which has as its business the distribution of sexually explicit material *which is obscene* as opposed to First Amendment material which may be sexually explicit and protected. Enterprise as applied to First Amendment activities is either vague or it is overbroad.

The vagueness of enterprise is explained by a former Chief of the Criminal Division of the U.S. Attorney's office for the Southern District of New York, who wrote in the *Columbia Law Review*, the following:

> The abstraction of the RICO enterprise enables the prosecution to define as an entity, whatever subset of a criminal organization they uncover, or to lump into a single enterprise a variety of criminal schemes that center on a particular individual or group.
>
> Lynch, *RICO: the Crime of Being a Criminal*, 87 Colum.L.Rev. 661, 965, note 196 (1987).

Persons engaged in the distribution of material protected by the First Amendment cannot know when that entity or some members became a criminal enterprise. There are no guidelines or standards applicable to First Amendment activities for a distributor or retailer or for prosecutors. The statute was not originally designed for nor can it be appropriately applied to First Amendment activities. This Court should determine the limits of the enterprise definitions.

If the Court should determine that a RICO enterprise can be applied to First Amendment activities, the enterprise must be

restricted to comply with the First Amendment principle of local community standards. This Court determined in *Hamling v. United States*, 418 U.S. 87, 94 S. Ct. 2887, 41 L.Ed.2d 590 (1974), that the jury can draw on its knowledge of the community from which it comes in deciding what conclusion the average person applying contemporary community standards would reach in a given case. The fact that distributors of allegedly obscene material may be subjected to varying community standards in the various judicial districts into which they transmit the materials, does not render the Federal statute unconstitutional. 94 S. Ct. at 2902. An example of the application of the local standard rule is *U.S. v. Elkins*, 396 F. Supp. 314 (C.D. Cal. 1975), wherein an indictment was dismissed. The alleged obscene material was distributed in Iowa. The Court determined that expert testimony as to community standards would not provide a proper basis on which the California jury could determine obscenity in that a special and integral part of the knowledge of the jurors comes into play in deciding which conclusion the average person applying contemporary community standards would reach in a given case. Expert testimony is permissible only to assist a jury in determining community standards. The Court concluded a jury from the California district could not determine the community standards of the Northern District of Iowa by reason that none of the California jurors possessed the knowledge of a juror in Iowa of the community standards.

Similarly, in *U.S. v. Mohney*, 476 F. Supp. 421 (Hawaii 1979), the Court dismissed an obscenity indictment. The *Mohney* court found *Hamling* did not indicate which standard would be used if the Government had the choice of bringing the action in either the district of transmission or the district of receipt and chose to bring the obscenity charge in the district of transmission. *Mohney* held it would be senseless to allow the community where the materials were transmitted to make the obscenity determination, but force that community to use the standards of the community where the material was distributed. The Court stated:

> Inherent in *Miller* and *Hamling* is the idea that jurors are drawing on personal knowledge of their own community. While expert opinions may be relevant, juries are completely free to disregard all expert testimony. If jurors cannot draw on personal knowledge, the idea of local community standards is a *totally* useless concept. (Emphasis in original)
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> 476 F. Supp. at 426-427.

Finally, the Sixth Circuit in *U.S. v. Peraino*, 645 F.2d 548 (6th Cir. 1981), found there was serious doubt that a jury of one district could properly determine the standards of another community solely on the basis of expert testimony, citing *Hamling*, 94 S. Ct. at 2924, n.5 (dissenting opinion). Citing *Elkins* and *Mohney*, the *Peraino* Court found that local standards establish the inherent difficulties of attempting to prosecute national conspiracies under a Federal obscenity statute in a single district. *See* 645 F.2d at 553.

Petitioner would concede that a national distributor, sending materials to Houston, Texas, for example, may be charged as part of an enterprise in Houston, but there would be limits on forfeiture as discussed herein. However, if there were regional distributors, who distributed the same material in other Federal districts or retail stores who sold or distributed the material in other Federal districts, these could not be part of the enterprise for the RICO crime or for RICO forfeiture allegations. A defendant or defendants must have activities in the particular judicial district in which the predicate obscenity charge is brought.

An enterprise must be restricted to those Defendants connected with the local standards and not be used as a multi-district conspiracy or to avoid multi-district obscenity charges. The enterprise for purposes of RICO or for RICO forfeiture, must be restricted under the First Amendment to comply with the local standard rule.

2. THE EXTENT OF PERMISSIBLE FORFEITURE UNDER RICO MANDATORY FORFEITURE PROVISIONS NEEDS TO BE CLARIFIED FOR FIRST AMENDMENT ACTIVITIES.

The RICO statute originally had two provisions relating to forfeitures which were construed by this Court in *Russello v. United States*, 464 U.S. 16, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983). Because of interpretations within the Circuits limiting its application, a new subsection 3 was prepared by Congress, while *Russello* was under review and enacted in 1984. This Court determined in *Russello* that interest under subsection (a)(1) acquired in violation of Section 1962, included proceeds or profits. It was distinct from interest in an enterprise under subsection (a)(2). The Court determined there are things forfeitable under one but not the other of the two subsections. The Amendment in 1984 preserved the existing language, but added a specific reference to proceeds in subsection 3, under what was deemed the better approach. The ambiguity regarding forfeiture of proceeds was resolved yet the body of case law interpreting the existing provisions of the RICO forfeiture statute was retained. The Department of Justice, the legislative history states, concurred in this judgment.

The Defendant in this cause has forfeiture allegations which request forfeiture of all of the property of Defendant under all of these provisions. There is a need to clarify the interpretation of the forfeiture provisions as applied to a Defendant engaged primarily in the distribution of First Amendment and who is charged under RICO where the predicate acts are solely dealing in obscene matter.

A. Forfeiture of all Interest in the Enterprise under 1963(a)(2) is Invalid.

This Court has recognized the significance of the Constitutional issue inherent in mandatory RICO forfeitures as applied to obscenity offenses when it granted certiorari in *Alexander v.*

United States, ____ U.S. ____, 112 S. Ct. 3024 (June 29, 1992). This Defendant cannot emphasize the unanimity of the Circuits and the all inclusiveness of the holdings of blanket forfeitures of all interest of the Defendant in the enterprise in the application of 1963(a)(2). This Court in *Russello* held that interest in the enterprise itself need not have been "illegally acquired."

The cases are unanimous that forfeiture is not limited under 1963(a)(2) to assets of a RICO enterprise that are tainted by use in connection with the racketeering activity, but extend to the convicted person's entire interest in the enterprise. *U.S. v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *U.S. v. Feldman*, 853 F.2d 648 (9th Cir. 1988); and *U.S. v. Horak*, 833 F.2d 1235 (7th Cir. 1987), are among those decisions which also recognized the possibility of 8th amendment violation. Forfeitures is mandatory regardless of its harshness. *U.S. v. Hess*, 691 F.2d 188 (4th Cir. 1982). A jury may not find that less than the full amount of the Defendant's interest in an enterprise is subject to forfeiture because Section 1963 is mandatory. *U.S. v. Cauble*, 706 F.2d 1322 (5th Cir. 1983). Differentiating between those parts of RICO enterprise engaged in racketeering activity and those that are not is not a requirement under the statute for determining whether a Defendant's interest is subject to forfeiture. *U.S. v. Walsh*, 700 F.2d 846 (2d Cir. 1983).

Section 1963(c) was amended in 1984 to include the relationback theory. Whether assets are tainted or untainted, Section 1963(c) provides that all right, title and interest in property described in 1963(a) vests in the United States upon the commission of the act giving rise to the forfeiture. The relationback theory provides the forfeiture takes effect immediately upon the commission of the act and would apply to property which is not obscene and which is protected or presumed protected by the First Amendment.

The theory of forfeiture of property is described in the early case of *United States v. Stowell*, 133 U.S. 1, 33 L.Ed. 555 (1890) as follows:

> By the settled doctrine of this Court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect *immediately* upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a *statutory transfer of the right to the United States at the time the offense is committed*, and the condemnation, when obtained, *relates back* to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." (Emphasis supplied)

The RICO statute is not only the forfeiture of protected expression, but has the effect of a pre-trial seizure by vesting in the United States by a statutory transfer of all of the assets, whether protected or not, which are alleged as part of the enterprise in the forfeiture allegations. The Indictment gives notice to the world that without any adjudication of obscenity, but because of an allegation of a few videos or magazines, all protected materials have been statutorily transferred to the United States subject to judicial condemnation.

In personam forfeiture of all assets of the Defendant in an enterprise as a method of assault upon First Amendment values should not be permitted.

B. Forfeiture of Assets as a Source of Influence under 1963(a)(2) Conflicts with Decisions that Forfeiture or Seizure Violates First Amendment Principles.

Various Circuits have recognized the rule of proportionality as regards the forfeiture of property as a "source of influence over a racketeering enterprise." *U.S. v. Porcelli*, 865 F.2d 1352 (2d Cir. 1989); *U.S. v. Anguilo*, 897 F.2d 1169 (1st Cir. 1990); *U.S. v. McKeithen*, 822 F.2d 310 (2d Cir. 1987); and *U.S. v. Zielie*, 734 F.2d 1447 (11th Cir. 1984).

Even applying a rule of proportionality, the RICO provisions for forfeiture of property as a source of influence violates First Amendment principles established almost universally by prior court decisions. *Anguilo* interpreted profits or proceeds and property affording an influence as being subject to forfeiture to the extent they are "tainted" by the racketeering activity. *See*, 897 F.2d at 1212. Under this test it was found that Cafe Pompeii afforded Defendants a source of influence over the enterprise and this real property was forfeitable since Defendants held meetings there. The cafe was used to further the affairs of the enterprise. This is contrary to First Amendment principles which would not allow forfeiture of projectors, bookshelves, theater seats, cash registers and other property simply because something obscene was once on the shelves, shown in the theater or the cash proceeds for the sale of the obscene item was put in the cash register. Likewise, in *McKeithen*, cited to support RICO forfeitures, it was determined that property affording a source of influence should be interpreted to mean property "used or intended to be used, in any manner or part, to commit or facilitate the commission of the proscribed violations." *See* 822 F.2d at 314. Even using the proportionality argument, the jury in *McKeithen* found that forty-three percent (43%) of an apartment property was to be forfeited.

In *Zielie*, which involved drugs, the forfeiture was ordered as a source of influence of several parcels of real property which were used almost exclusively as money counting houses or stash houses. *See* 734 F.2d at 1459.

It must be remembered that the original RICO statute was adopted in 1970. All of the legislative history was dedicated to the discussion of the use of forfeitures against criminal acts, including organized crime as established in the 1970 statute. RICO was not extended to dealing in obscene matter until 1984. There is no legislative history as to the interpretation of forfeitures as applied to First Amendment activities. *United States v. Martino*, 681 F.2d 952 at 961 (1982), stated as to RICO forfeitures:

> We acknowledge that its breadth supplies a potential for great abuse. The harshness of the statute's impact, however, cannot dictate the proper construction of its provisions. Congress was aware of the far reaching measures it was enacting to deal with the unprecedented problem of organized crime.

Martino was affirmed by this Court as *Russello, supra.* At the same time that the Courts were construing "source of influence" under RICO, the Courts were deciding issues under the First Amendment to return projectors and other property which now create conflicts. For example, the Fifth Circuit in *Universal Amusement Company v. Vance*, 559 F.2d 1286, *aff'd. en banc*, 587 F.2d 176, held the seizure of motion picture projectors at the time there were seizures of films from the theater was harassment and prosecution in bad faith. The state of Texas did not appeal. It did appeal an injunctive-type procedure which was part of the same case. This Court affirmed in *Universal Amusement Co. v. Vance*, 445 U.S. 308, 100 S. Ct. 1156, 63 L.Ed.2d 413.

In *United States v. Polak*, 312 F. Supp. 112 (E.D. Pa. 1970), the Court ordered return of the Defendant's personal property and ruled that seizures of such instrumentalities as postage meter machines, addressoplates and envelopes on the grounds that these items or instrumentalities are evidence of a crime charged in the Indictment was impermissible not only before trial, but even after a final determination of obscenity, citing *Near v. Minnesota*, 283 U.S. 697 (1931). The language of the District Court is most appropriate in considering the seizing of property either as an *interest* in an enterprise or as a *source of influence* when the Court stated:

> If the Government's argument on this point is accepted, they would be permitted to seize and retain the printing presses of a large metropolitan newspaper if a single commercial advertisement printed in the newspaper were deter-

> mined to be obscene. The next step would be to seize a television network on the ground, perhaps, that its instrumentalities were used in connection with the dissemination of an obscene film. The scope of the power asserted is almost limitless. To permit the Government by this device to seize the very instrumentalities of speech would affect a much more drastic suppression of the opportunities of expression than any of the prior restraints which have been heretofore considered and condemned by the United States Supreme Court.
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> 312 F. Supp. at 116.

The same language could be paraphrased to the forfeiture as a source of influence of bookshelves, television screens, televisions or VCR's, theater seats, buildings used to house bookstores or theaters, homes where people could allegedly meet on First Amendment activities found to be obscene, as well as the seizure of newspaper and printing equipment, television networks or the shares of stock or interest of parties in such facilities because it is asserted that such facilities were a "source of influence" if not already forfeited as the Defendant's "interest" in the enterprise under 1963(a)(2).

Likewise, in *State v. A Motion Picture Entitled "The Bet"*, 219 Ka. 64, 547 P.2d 760 (1976), the Kansas Supreme Court following First Amendment principles found there was a difference when property had been used to further illegal activities in the areas of gambling, prostitution or drug trafficking and can be legally destroyed so as not to offend again. The regulation of expression, however, has the effect of imposing prior restraints. In this sensitive field, the State may not employ means that broadly stifle fundamental personal rights where the end can be more narrowly achieved. In other civil and criminal obscenity cases, the Courts have unanimously held that the state may not

seize or forfeit personal property such as shelves and projectors used to disseminate obscene material.[3]

Not only does the First Amendment prohibit the seizing of the Defendant's entire interest in an enterprise, but the "source of influence" provisions of RICO must be construed to prohibit forfeiture of any neutral property such as projectors, theater seats, bookshelves, theater buildings. The only thing subject to forfeiture under RICO is the "tainted" property, which is the proceeds from the particular obscene material under 1963(a)(1) and (3).

The conflict between First Amendment principles and the RICO forfeiture provision requiring forfeiture of all property which is "a source of influence" needs to be resolved in favor of First Amendment principles.

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[3] *State v. Feld*, 155 Ariz. 88, 745 P.2d 146, 155 (Ariz. App. 1987), *cert. denied*, 485 U.S. 977 (1988) (RICO forfeiture provisions unconstitutional as applied in obscenity case to authorize post-conviction forfeiture of "bookshelves, cash registers, or similar items" used for protected speech activities); *Maguin v. Miller*, 433 F. Supp. 223, 230 (D. Kan. 1977) (enjoining seizure of "property necessary for the operation of theaters," as such seizures would "constitute an impermissible prior restraint"); *Bongiovanni v. Hogan*, 309 F. Supp. 1364, 1366 (S.D.N.Y. 1970) (enjoining forfeiture of projection equipment, citing *Near*); *G.I. Distributors, Inc. v. Murphy*, 336 F. Supp. 1036, 1038-1039 (S.D.N.Y. 1972) (ordering return of "items required in the conduct of" bookstore, on grounds that seizure "effectively prevented" distribution of other, constitutionally protected materials); *Star Distributors, Ltd. v. Hogan*, 337 F. Supp. 1362, 1364 (S.D.N.Y. 1972) (ordering return of property the seizure of which "worked a complete and total restraint" on publisher's lawful First Amendment activities and "deprived the public of an opportunity to receive its non-obscene publications"); *Porno, Inc. v. Municipal Court*, 33 Cal.App.3d 122, 126, 108 Cal.Rptr. 797, 800 (1973) (ordering return of projectors on prior restraint grounds); *Europo Books, Inc. v. Pomerleau*, 395 A.2d 1195, 1198 (Md. 1979) (enjoining practice of seizing projectors on theory that this was as invalid a prior restraint as "to seize the printing presses because the newspaper contains patently obscene matter"); *Ellwest Stereo Theatre, Inc. v. Byrd*, reported *sub nom. Universal Amusement Co. Inc. v. Vance*, 404 F. Supp. 33, 51, 54-57 (S.D. Tex. 1975) (seizure of projectors based on probate obscenity constituted bad faith harassment).

C. Forfeiture of Assets as an Interest under 1963(a)(1) or Proceeds Under 1963(a)(3) Must be Limited so as not to Violate First Amendment Principles.

Interest, which this Court has construed to be proceeds in *Russello* and proceeds as enacted in (a)(3), must be narrowly construed and limited when applied to First Amendment activities. This Court has determined that community standards will vary throughout the nation which serves the principle of the First Amendment. There is no national community standards and instead Federal prosecutions for transportation of allegedly obscene materials in interstate commerce must be tested by local contemporary community standards. A juror is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination.

The result is that there may be prosecutions in Houston, Texas for obscenity under local community standards, though the community from which it was sent would accept or tolerate the same material. Material is entitled to First Amendment protection except where it violates community standards. A classic example is "*Deep Throat.*" It may be illegal in one jurisdiction. However, in other communities it may have been construed as protected or never even bothered and therefore presumed to be legal. The District Court in Dallas in *U.S. v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377 (N.D. Tex. 1991), which is on appeal to the Fifth Circuit, applied this concept to a similar forfeiture procedure in 18 U.S.C. § 1467(a)(2), as to property constituting gross profits or other proceeds. That Court correctly determined that only the proceeds from the sale of the obscene material in the Dallas area were subject to forfeiture. The obscene video tapes were presumed to be not obscene in all other parts of the country so proceeds from their sale in any other areas cannot be deemed to be proceeds obtained from an offense under the Federal obscenity statute.

The same would be applicable to a Defendant if this Court determined the Defendant could be properly charged under RICO and found guilty using obscenity predicates. It was undisputed by *Alexander* in his Brief to the Court that proceeds from the sale of specified materials determined to be obscene would be forfeitable. This would be correct as to the proceeds from the sale in that *particular district*. For example, if the classic film "*Deep Throat*" were found obscene in Houston, the proceeds from all the distributions in the Houston area could be ordered forfeited. However, proceeds from distributions in any other areas of the nation could not be ordered forfeited. This would be particularly appropriate for a national distributor of First Amendment material. The United States could not select a venue in which it believed the material would be obscene and then request forfeiture of the proceeds from that obscene material nationwide. Even under the proceeds section of RICO forfeiture, the First Amendment requires the Court limit any forfeiture to the proceeds of the obscene material only in that particular local jurisdiction.

CONCLUSION

For all of the foregoing reasons, Petitioner respectfully urges the Court to grant a Writ of Certiorari and clarify the application of RICO to First Amendment activities.

Respectfully submitted,

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

Mary Jane JENKINS,
Defendant-Appellant.

No. 92--2002

United States Court of Appeals,
Fifth Circuit.

Oct. 5, 1992.

Appeal from the United States District Court for the Southern District of Texas.

Before VAN GRAAFEILAND *, KING and EMILIO M. GARZA, Circuit Judges.

VAN GRAAFEILAND, Circuit Judge:

Mary Jane Jenkins appeals from an order denying her motion to dismiss, dissolve or modify a pretrial restraining order issued pursuant to 18 U.S.C. § 1963(d). We affirm.

On April 9, 1991, a grand jury sitting in the Southern District of Texas indicted Jenkins and five individual co-defendants, charging them, among other things, with conducting and conspiring to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962 ("RICO"). The alleged enterprise consisted not only of the six defendants, but also sixteen unindicted corporations, each of which allegedly was controlled by Jenkins. Except for two foreign holding companies, the corporations were scattered throughout the South. All

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* Senior Circuit Judge of the Second Circuit, sitting by designation.

of them allegedly were connected directly or indirectly with the operation of adult bookstores and/or peep show video arcades. The indictment listed ten predicate racketeering acts, nine of which dealt with the transportation of obscene material in interstate commerce, 18 U.S.C. §§ 1462 and 2, and one which dealt with the promotion of obscene material, Tex.Penal Code § 43.23 and 18 U.S.C. § 1961(1)(A). The indictment asserted a penalty of forfeiture under 18 U.S.C. § 1963(a), and sought forfeiture of the sixteen corporations, bank accounts belonging to several of the corporations, money seized in prior raids, and Jenkins' automobile and residence.

On April 10, 1991, the government obtained an *ex parte* restraining order pursuant to 18 U.S.C. § 1963(d), which in substance prohibited the defendants and the unindicted corporations from selling, assigning, transferring, encumbering or removing from the jurisdiction of the court any assets owned by or owed to them. The order required that weekly payments to Jenkins (the proceeds of a 1989 sale of four adult bookstores) be turned over to the United States Marshals Service, to be held until forfeitable upon conviction. It also directed defendants to maintain the properties and "to abstain from using the . . . properties and enterprises in any way to violate any state, federal or local laws." Finally, the order provided that:

> No person shall consider this Order as a restraint or prohibition to the carrying on of any lawful activity or business, and the above mentioned businesses and commercial establishments are not restrained or prohibited from operating any lawful businesses in a normal business manner, including the payment of salaries, outstanding debts, and liabilities that exist as of the date of the filing of this Order, as long as the normal conduct of business does not dissipate or diminish the value, as of April 9, 1991, of the assets, properties, and interests subject to forfeiture to the government. Nothing in this Order shall be construed to

restrain the dissemination of visual or printed matter, nor to condone the illegal sale or distribution of obscene material.

On July 17, 1991, Jenkins moved that the order be dissolved and requested a hearing, which was held on September 27, 1991. Jenkins' principal argument was that both RICO's substantive prohibitions and its forfeiture and restraining order provisions are unconstitutional as applied to those charged with selling obscene materials. On November 20, the district court denied Jenkins' motion, largely because the challenged order allowed the parties to continue their operations, including the selling of the allegedly obscene material.

[1, 2] Under the law of this circuit, the district court's denial of Jenkins' motion is an interlocutory order refusing to modify or dissolve an injunction, and, as such, is immediately appealable under 28 U.S.C. § 1292(a)(1). *See United States v. Thier*, 801 F.2d 1463 (5th Cir. 1986), *modified on other grounds*, 809 F.2d 249 (5th Cir. 1987) (accepting a similar appeal without discussion of appealability). To say that the order below is appealable, however, is not to say that we should consider all the wide-ranging issues Jenkins has raised. As a general rule, courts of appeals should conduct only a limited review in interlocutory appeals, and should address only the propriety of the order that gave rise to the appeal. *See Brown v. Chote*, 411 U.S. 452, 456-57, 93 S.Ct. 1732, 1735-36, 36 L.Ed.2d 420 (1973); *Enterprise Int'l v. Corporacion Estatal Petrolera*, 762 F.2d 464, 470 (5th Cir. 1985). Judicial restraint is especially appropriate where, as here, we are asked to reach out and decide broad and difficult constitutional questions. "Constitutional questions should be decided only when unavoidable, and this is particularly true when the issue is raised on appeal from an interlocutory order." *Yahr v. Resor*, 431 F.2d 690, 691 (4th Cir. 1970), *cert. denied*, 401 U.S. 982, 91 S.Ct. 1192, 28 L.Ed.2d 334 (1971). *See also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501-03, 105 S.Ct. 2794, 2800-02, 86 L.Ed.2d 394 (1985).

If we were to consider Jenkins' facial challenges to RICO at this stage in the proceedings, we would have to do so without the benefit of a complete record, specialized findings of fact, and the reasoned judgment of the district court. These are important in any constitutional case, but are especially so in First Amendment cases concerning allegedly obscene materials, where the extent of the Constitution's protection may vary depending on the circumstances. Finally, and of particular significance, we note that the United States Supreme Court recently has granted certiorari in *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991), *cert. granted*, __ U.S. __, 112 S.Ct. 3024, 120 L.Ed.2d 895 (1992), a case raising similar concerns about the constitutionality of RICO's forfeiture and restraining order provisions as applied to those dealing in allegedly obscene materials. Wisdom dictates that we await the Supreme Court's teaching.

Insofar as Jenkins' appeal is limited to the validity of the restraining order, she urges the following four grounds for reversal: (1) the order is an impermissible prior restraint of protected First Amendment activity; (2) by directing the seizure of funds and the delivery of money to United States Marshals, the order indirectly restrains her in the exercise of protected First Amendment rights; (3) the issuance of the *ex parte* restraining order denied her procedural due process; and (4) the order is overbroad because it affects unindicted third parties.

[3,4] It is, of course, well-settled that the government may not seize presumptively protected expressive materials without a prior judicial determination of obscenity. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63, 109 S.Ct. 916, 927, 103 L.Ed.2d 34 (1989); *Universal Amusement Co. v. Vance*, 587 F.2d 159, 169 (5th Cir. 1978) (en banc), *aff'd*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980). However, the restraining order did not effect such a seizure. *See United States v. Alexander*, 736 F.Supp. 968, 973 (D. Minn. 1990). Indeed, the order explicitly provides that "the above mentioned businesses and commercial

establishments are not restrained or prohibited from operating any lawful business in a normal business manner," and that "[n]othing in this Order shall be construed to restrain the dissemination of visual or printed matter." As the Government conceded at oral argument, this restraining order does not interfere with the sale even of obscene materials.

Admittedly, the restraining order at issue here could have been drafted more clearly. The Government describes as "surplus" the order's "obey the law" admonition that the named defendants and corporations "abstain from using the . . . properties and enterprises in any way to violate any state, federal or local laws." If surplusage, the clause would have been better omitted. On balance, however, it is outweighed by the other portions of the order, which permit Jenkins to continue to conduct business and disseminate presumptively protected materials.

[5] Contrary to Jenkins' claim, the order is not invalid because it directs the seizure of certain funds and the payment of certain other moneys received to United States Marshals. Although restraints on the use of funds might under some circumstances improperly impede a defendant's ability to exercise First Amendment rights, there is nothing to indicate that this has occurred in the instant case. As the district court found, "the defendant has continued conducting business. There is no evidence that the businesses have not been able to pay their bills as a result of this order, or to otherwise conduct the businesses' day-to-day operations."

[6] Jenkins' procedural due process arguments likewise are without merit. It cannot be gainsaid that a post-indictment petition for a restraining order stands on a stronger footing that a pre-indictment petition. *Compare* 18 U.S.C. § 1963(d)(1)(A) *with* § 1963(d)(1)(B) *and* -(d)(2); *see United States v. Musson*, 802 F.2d 384, 386-87 (10th Cir. 1986); *United States v. Pryba*, 674 F.Supp. 1504, 1508 (E.D. Va. 1987). In applying *ex parte* for

the order at issue herein, the Government asserted that it might suffer irreparable harm if the order was not entered because the defendants or their agent might "sell, alienate, encumber, transfer or otherwise place the above-described property beyond forfeitable condition and thereby frustrate the ends of public justice." In signing the proposed order, the district court said it was doing so "to assure that the defendants, and their agents, servants, employees, attorneys and those in active concert or participation with them, do not place certain property beyond the jurisdiction of this Court or otherwise detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States, by defeating the jurisdiction of this Court over such property."

In the district court's order which followed a hearing on Jenkins' motion to quash, the district court reiterated its previously stated reasoning that "the [seizure] order seeks to assure that if the government prevails on its claim(s) under RICO, the property affected by the forfeiture provisions of RICO is not beyond the jurisdiction of this Court." The district court also held that the 10-day limitation on restraining orders contained in Fed. R.Civ.P. 65(b) was mooted by the hearing which the district court held or alternatively that the time limitation was waived by the delay in seeking a hearing on the motion. The procedure followed by the district court satisfied the due process requirements summarized by this court in *United States v. Thier, supra,* 801 F.2d at 1466-69.

[7] Finally, we are not persuaded by Jenkins' argument that the restraining order, by binding unindicted corporations, is impermissibly overbroad. Nothing in the language of RICO's restraining order provision restricts the scope of such orders so that only parties may be bound; to the contrary, RICO permits the court to "take any other action" deemed necessary "to preserve the availability of property" subject to forfeiture. 18 U.S.C. § 1963(d)(1). Indeed, equity traditionally has permitted third par-

ties to be bound in circumstances such as those alleged here. As the Supreme Court noted in examining Fed.R.Civ.P. 65(d):

> [A] decree of injunction not only binds the parties defendant but also those identified with them in interest, in "privity" with them, represented by them or subject to their control. In essence it is that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.

Regal Knitwear Co. v. NLRB, 324 U.S. 9, 14, 65 S.Ct. 478, 481, 89 L.Ed. 661 (1945).

The Government, when seeking a restraining order under § 1963(d)(1), need only "articulate a cogent thesis or theory of its entitlement" to potentially forfeitable property. *United States v. Regan*, 699 F.Supp. 36, 38 (S.D.N.Y.1988). This it has done. These corporations, it is alleged, are not innocent, unrelated third parties, but rather are an integral part of the criminal enterprise and under Jenkins' total and exclusive control. The district court did not err in finding that it was necessary to bind the sixteen unindicted corporations in order to preserve assets subject to forfeiture.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIM. ACTION NO. H-91-50-1

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARY JANE JENKINS, ET AL.,
Defendants

ORDER DENYING THE DEFENDANT'S MOTION TO QUASH

[Entered: Nov. 21, 1991]

Pending before the Court is the defendant's, Mary Jane Jenkins, motion to dissolve the *ex parte* restraining order that was entered by this Court on or after February 10,1991, pursuant to Title 18 U.S.C. § 1963(d). After a review of the motion, response, and supporting authorities and arguments of counsel, the Court is of the opinion that the defendant's motion should be denied.

Background:

On or about April 9, 1991, a Grand Jury returned a multiple count indictment against the defendant and several others finding probable cause to believe that the defendants had committed acts in violation of the Racketeering, Influence and Corruption Organizations Act ("RICO"), and conspiracy arising out of the interstate sale of allegedly obscene materials.

Contentions and Discussion

The defendant contends that the restraining order is an impermissible prior restraint on protected First Amendment activity and that the pretrial restraining order is a seizure of the defendant's property. As an aside, the defendant argues that the restraining order had a life of 10 days and has long since expired. This latter argument will not be addressed because in the Court's opinion it is mooted by this hearing; alternatively, the argument was waived by the delay in seeking a hearing on the motion.

The defendant's contentions that the restraining order is an impermissible prior restraint and that it also constitutes a seizure, turn on the question of whether the conduct permitted by the restraining order constitutes a pretrial seizure. Thus, the Court's attention will be focused on this issue.

The Court's restraining order enjoined the defendants from:

> selling, assigning, pledging, distributing, encumbering or otherwise disposing of, or removing from the jurisdiction of this Court all or any part of their interest, direct or indirect, in the property described . . . in the Indictment.

The Court also enjoined alienation of any interest that the defendants might have in the proceeds derived from the corporate entities as well as various personal property which source may be traced to the businesses that are the subject of the alleged racketeering activities.

The defendant directs the Court to several cases that she believes support her contentions. Specifically, the Court is directed to *Ft. Wayne Books Inc. v. Indiana*, 489 U.S. 46 (1989); *Bantam Books. Inc. v. Sullivan*, 372 U.S. 58 (1963); *Penthouse International Limited v. McAuliffe*, 610 F.2d 1354 (5th Cir. 1980). These cases, the defendant argues, stand for the proposition that a pretrial restraining order in a *per se* violation of the First Amendment because the order permits, at the very least,

constructive seizure of expressive and non-expressive property. The defendant has supplemented her motion to dismiss by citing *United States v. California Publishers Liquidating Corporation. et al.*, No. 3-90-318-H (N. D. Texas 1991).

In this Court's opinion the case that is more analogous to the one at bar is the *United States v. Alexander. et al.*, 736 F. Supp. 968 (D. Minn. 1990). In *Alexander*, the court focused on a pretrial restraining order that had been entered against the defendants pursuant to Title 18 U.S. C. § 1963. Like the case at bar, the constitutionality of the application of the RICO forfeiture provisions to expressive and non-expressive property was at issue. Having considered the reasoning stated in *Alexander*, this Court is of the opinion that the restraining order is valid and should remain in effect.

Here, the Court has fashioned its order sufficiently narrow such that the defendant may continue in the business of selling constitutionally protected materials. Moreover, the order is clear and sufficiently precise that the defendant knows the specific materials that have been targeted. (Specific materials were seized pursuant to search warrant(s) and pursuant to the indictments). Under the terms of the Court's order, the defendant has continued conducting business. There is no evidence that the businesses have not been able to pay their bills as a result of this order, or to otherwise conduct the businesses' day-to-day operations.

Specifically, the order seeks to assure that if the government prevails on its claim(s) under RICO, the property affected by the forfeiture provisions of RICO is not beyond the jurisdiction of this Court. The day-to-day activities of selling books and magazines have not been impaired by this order. The fact that the defendants are more cautious about the products that they are selling is not prior restraint. It is against the law to sell obscene materials. That fact alone is sufficient reason to pause and be cautious.

The First Amendment is not implicated by the restraint from sale or use of personal or real property that is derived from First Amendment activities. Thus, the First Amendment protections do not apply to a printing press in spite of the fact that a printing press may generate a document that enjoys First Amendment protection.

The defendant's motion to quash the temporary restraining order is DENIED because there is no pretrial seizure of materials protected by the First Amendment.

The defendants' contentions concerning the constitutionality of RICO are reserved.

Signed this 20th day of November, 1991.

/s/Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NUMBER: H-91-50

UNITED STATES OF AMERICA

V.

MARY JANE JENKINS
a/k/a MARIJANE JACKSON
a/k/a LYNDA GRAY ENTRATTER
a/k/a LYNDA IVEY

EVAN PETER PIGMAN
a/k/a PETE PIGMAN

JO ANN ROCHELLI

DAVID CARL STUBBS

RICKIE HERBERT RANNEY
a/k/a RICK RANNEY

ROBERT EUGENE SMITH

CHARLES WILLIAM BOYLE

LARRY WAYNE MALADY

ORDER

[Entered: Apr. 10, 1991]

This matter having come before the Court on *ex parte* Motion of the United States of America for a restraining order pursuant to Title 18, United States Code, Section 1962 and 1963 which provides for jurisdiction to enter restraining orders and take such other actions as the Court shall deem necessary in connection with any property or other interest subject to forfeiture pursuant to Section 1963 of Title 18, United States Code.

The court finds it necessary to enter this Order as prayed for by the United States, to assure that the defendants, and their agents, servants, employees, attorneys and those in active concert or participation with them, do not place certain property beyond the jurisdiction of this Court or otherwise detrimentally affect the Government's interest in such property, thereby frustrating the ends of justice and causing irreparable harm to the United States, by defeating the jurisdiction of this Court over such property.

IT IS HEREBY ORDERED that the defendants, MARY JANE JENKINS a/k/a LYNDA GRAY ENTRATTER a/k/a LYNDA IVEY, EVAN PETER PIGMAN a/k/a PETE PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS, RICKIE HERBERT RANNEY a/k/a RICK RANNEY and LARRY WAYNE MALADY, their agents, servants, employees, attorneys, family members, and those persons in active concert or participation with them, are hereby ordered and enjoined from selling, assigning, pledging, distributing, encumbering, or otherwise disposing of, or removing from the jurisdiction of this Court all or any part of their interest, direct or indirect, in the property described in the Forfeiture section of the Indictment returned by the United States Grand Jury for the Southern District of Texas on April 9, 1991. Such property is described in that portion of the Indictment as follows:

1. IT IS HEREBY FURTHER ORDERED that the defendants, and those corporations named in the forfeiture allegations of the indictment, their servants, employees, attorneys, and those persons in active concert or participation with them are prohibited from selling, assigning, or transferring or removing from the jurisdiction of this Court without prior approval of the Court and upon notice to the United States with an opportunity for the United States to be heard, any right, title, or interest in or any assets from, belonging to, or owed to the corporations, or entities known as:

A. Mustatara Investments, N.V. (Mustatara), a foreign holding company in the Netherlands Antilles;

B. Jabar, Limited (Jabar), a foreign holding company in the Bahamas;

C. Phoenix and Associates Management, Ltd. (Phoenix Management), a Nevada corporation, formerly operating as Ibron Industries, Inc., a California corporation, and Praxis Management Company, a California corporation;

D. Saxet Management, Inc. (Saxet Management), a Texas corporation, doing business as **World News,** an adult bookstore/video arcade at 3305 East Highway 80, Abilene, Texas and **Talk of the Town,** an adult bookstore/video arcade at 321 Linda Drive, San Marcos, Texas;

E. Saxet, Inc. (Saxet), a Georgia corporation, doing business as **Bellaire News,** an adult bookstore/video arcade at 5807 Bellaire Boulevard, Houston, Texas; **Arcade News,** an adult bookstore/video arcade at 5821 Hillcroft, Houston, Texas; and **Doc Johnson's Arcade,** an adult bookstore/video arcade at 6431 Hillcroft, Houston, Texas;

F. La Grange Trading Company (La Grange Trading), a California corporation, doing business as **Diner's News,** an adult bookstore/video arcade at 240 Westheimer, Houston, Texas; **Apollo** News, an adult bookstore/video arcade at 2376 Austin Highway, San Antonio, Texas; **Pleasure Shoppe,** an adult bookstore/video arcade at 603 West Oltorf, Austin, Texas; and **Airline Book Store,** an adult bookstore/video arcade at 1824 Airline Highway, Kenner, Louisiana;

G. Lamar Avenue Books, Inc. (Lamar Avenue Books), a Tennessee corporation, doing business as **Cherokee Theater,** an adult bookstore/video arcade at 2747 Lamar Avenue, Memphis, Tennessee;

H. East Brooks Books, Inc. (East Brooks Books), a Tennessee corporation, doing business as **Airport Theater,** an adult bookstore/video arcade at 2214 East Brooks Road, Memphis, Tennessee, and **Get Well Bookmart,** an adult bookstore/video arcade at 1275 Get Well Road, Memphis, Tennessee;

I. Business Financial Services, Inc. (Business Financial services), a Georgia corporation, doing business as **West Knoxville News,** an adult bookstore/video arcade at 5005 Kingston Pike, Knoxville, Tennessee;

J. Anwar Enterprises, Inc. (Anwar Enterprises), an Alabama corporation, doing business as **Birmingham Books,** an adult bookstore/video arcade at 7610 First Avenue North, Birmingham, Alabama;

K. Western Adult Enterprises, Inc. (Western Adult Enterprises), an Alabama corporation, doing business as **Alabama Adult Books,** an adult bookstore/video arcade at 901 Fifth Avenue North, Birmingham, Alabama;

L. Richland Bookmart, Inc. (Richland Bookmart), a South Carolina corporation, doing business as **Town and Country,** an adult bookstore/video arcade at 7011 Clinton Highway, Knoxville, Tennessee;

M. Sommer Avenue Books, Inc. (Sommer Avenue Books), a Tennessee corporation, doing business as **Paris Theater,** an adult bookstore/video arcade at 2432 Sommer Avenue, Memphis, Tennessee;

N. Stuart Services Company (Stuart Services), a Nevada corporation;

O. Jabar Leasing Company, Ltd. (Jabar Leasing), a California corporation;

P. Sixth Ray, Inc. (Sixth Ray), a Georgia corporation, doing business as **Unique Beauty Supply** in the state of Georgia;

2. IT IS HEREBY FURTHER ORDERED that the defendants, and those corporations named in the forfeiture allegations of the indictment, their servants, employees, attorneys, and those persons in active concert or participation with them are prohibited from selling, assigning, or transferring or removing from the jurisdiction of this Court without prior approval of the Court and upon notice to the United States with an opportunity for the United States to be heard, any right, title, or interest in the following assets:

A . The following vehicle or, if sold, the proceeds therefrom:

(1) One 1987 Nissan 300ZX coupe, VIN JNlCZ14S2HX150668, registered to Gelco Corporation/Lynda Entratter, 605 Old Ballas Road, St. Louis, Missouri 63141.

B. The following personal property and the proceeds therefrom:

(1) approximately $33,880.97 cash seized by agents of the Federal Bureau of Investigation from the safe in STUBB'S warehouse, 7397 Ashcroft, Houston, Texas on June 30, 1988;

(2) cashiers checks and the proceeds therefrom seized by agents of the Federal Bureau of Investigation from the safe in STUBB'S warehouse, 7397 Ashcroft, Houston, Texas on June 30, 1988 as follows:

a. First National Bank, Paragould, Arkansas cashier's check #29542, 6/29/88, to Saxet Special Account in the amount of $1,500.00;

b. First National Bank, Paragould, Arkansas cashier's check #29544, 6/29/88, to White Fabricating Co. in the amount of $2,719.75;

c . First National Bank, Paragould, Arkansas cashier's check #29541, 6/29/88, to Concorde Development Co. in the amount of $2,000.00;

d. Colonial Bank, Birmingham, Alabama official cashier's check #314944155, 6/27/88, to Alabama Adult Books in the amount of $1,795.00;

e. Merchant's Bank, Kenner, Louisiana cashier's check #A138645, 6/27/88, to White Fabricating Co., Inc. in the amount of $3,856.50;

(3) approximately $9,033.18 seized by agents from the Federal Bureau of Investigation from a safe inside Arcade News Bookstore, 5821 Hillcroft, Houston, Texas on June 30, 1988.

C. The following real property and the proceeds therefrom:

(1) Lots 6 and 7 of Forest Park Addition and in Block No. 4907 A of the city of St. Louis, State of Missouri, having an aggregate front of 200 feet on the north line of said addition; bounded on the east by lot no. 5 and the west by lot no. 8 of said block and addition and south by Portland Place, together with all buildings, fixtures, and improvements thereon.

3. IT IS HEREBY FURTHER ORDERED that the defendant JENKINS' interests in **Arcade News, Bellaire News, Doc Johnsons, and Diner's News,** memorialized in and represented by an Asset Purchase And Sale Agreement, attached hereto as Exhibit 1, including a weekly payment schedule, payments on which are still being made at the present time from HIHOUSTON, Inc. a duly chartered Texas corporation, with its registered office

at 100 N.E. Loop 410, Suite 1070, in the City of San Antonio, County of Bexar, State of Texas, referred to in the agreement as the "buyer" be paid by the "buyer" and his successors and assigns in the periodic amounts due on the note as reflected on the payment schedule included therein to the United States Marshalls [sic] Service, to be held by them for the period of the order and until such time as the proceeds of the note become forfeitable upon conviction.

4. IT IS HEREBY FURTHER ORDERED that the United States Marshall [sic] Service be allowed access to the aforementioned corporations, enterprises and properties and their books and records periodically and at all reasonable times without prior notice ^ (, in the most unobtrusive manner possible, [K.H.]) to assure that the order sought herein is being complied with and, to this end, that the defendants and their agents cooperate with and provide the information and all the supporting documents necessary for the United States Marshall [sic] Service to discharge their duties.

5. IT IS HEREBY FURTHER ORDERED that the defendants and corporations named in the forfeiture allegations of this indictment comply in all respects with all provisions of this restraining order including maintaining all property in accordance with this order, maintaining insurance on all properties and providing information and cooperating with respect to all matters contained herein, and to abstain from using the above-described properties and enterprises in any way to violate any state, federal or local laws.

6. IT IS HEREBY FURTHER ORDERED that the Defendants refrain from taking any actions in the normal conduct of their business that would not be considered standard, normal business practices of a reasonable and prudent business person.

7. IT IS HEREBY FURTHER ORDERED that the government's original ex parte motion for restraining order,

amended ex parte motion for restraining order, and the orders signed by this Court related to these motions be SEALED, and that no person shall have access to same except the Clerk or his designated deputies, attorneys for the United States, and authorized representatives of the Federal Bureau of Investigation, Internal Revenue Service and U.S. Marshal Service.

No person shall consider this Order as a restraint or prohibition to the carrying on of any lawful activity or business, and the above mentioned businesses and commercial establishments are not restrained or prohibited from operating any lawful businesses in a normal business manner, including the payment of salaries, outstanding debts, and liabilities that exist as of the date of the filing of this Order, as long as the normal conduct of business does not dissipate or diminish the value, as of April 9, 1991, of the assets, properties, and interests subject to forfeiture to the government. Nothing in this Order shall be construed to restrain the dissemination of visual or printed matter, nor to condone the illegal sale or distribution of obscene material.

SIGNED on this the 10th day of April, 1991, at Houston, Texas.

/s/Kenneth Hoyt
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances."

18 U.S.C. § 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means . . . Sections 1461-1465 (relating to obscene matter) . . .

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

18 U.S.C. § 1962. Prohibited activities . . .

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from

an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (I) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(l) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest

in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction. be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited. the court may, upon application of the United States. enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees. or take any other action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United Sates or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or Interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in

irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the ,proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to

(1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter. or take any other action to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

(2) compromise claims arising under this section;

(3) award compensation to persons providing information resulting in a forfeiture under this section;

(4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

(5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

(1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

(2) granting petitions for remission or mitigation of forfeiture;

(3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

(4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

(5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

(6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (1), no party claiming an interest in property subject to forfeiture under this section may

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged Interest in the property subsequent to the filing of an indictment or

information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(*l*)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United State [sic] pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of

purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (I) through (5).

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NUMBER: H-91-50

UNITED STATES OF AMERICA

V.

MARY JANE JENKINS
a/k/a MARIJANE JACKSON
a/k/a LYNDA GRAY ENTRATTER
a/k/a LYNDA IVEY

EVAN PETER PIGMAN
a/k/a PETE PIGMAN

JO ANN ROCHELLI

DAVID CARL STUBBS

RICKIE HERBERT RANNEY
a/k/a RICK RANNEY

ROBERT EUGENE SMITH

CHARLES WILLLIAM BOYLE

LARRY WAYNE MALADY

GOVERNMENT'S AMENDED *EX PARTE* MOTION FOR A RESTRAINING ORDER

[Filed: Apr. 10, 1991]

The United States Attorney for the Southern District of Texas, by and through the undersigned Special Assistant United States Attorney and/or Assistant United States Attorney, moves this Court for a restraining order and other relief as set forth below:

1. On April 9, 1991 MARY JANE JENKINS a/k/a LYNDA GRAY ENTRATTER a/k/a LYNDA IVEY, EVAN PETER

PIGMAN a/k/a PETE PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS, RICKIE HERBERT RANNEY a/k/a RICK RANNEY and LARRY WAYNE MALADY, were named in the indictment charging R.I.C.O. and conspiracy to commit R.I.C.O. in violation of Title 18, United States Code, Section 1962(a), 1962(b) and 1962(c) returned in the Southern District of Texas.

2. The Forfeiture allegations of the indictment allege that certain propriety interests of the defendant JENKINS, were forfeitable to the United States under the R.I.C.O. criminal forfeiture provisions of Title 18, United States Code Sections 1963(a), 1963(b) and 1963(c). That section of the indictment is incorporated by reference into this motion as follows:

3. That all of the above-described property and interests of the defendant JENKINS are forfeitable upon conviction.

4. That the government's right to the assets described in the indictment attached as of the date those assets were acquired, maintained or utilized in violation of the R.I.C.O. statute (18 U.S.C. Sections 1962, 1963).

5. Restraining a disposition of defendant JENKINS' assets is necessary to the state of the proceedings for two reasons, first, to the extent those assets were acquired or utilized in violation of the R.I.C.O. statute, they are held in constructive trust for the benefit of the government. Secondly, the public's interest in the property for which the grand jury found probable cause to believe is forfeitable demands that an accurate accounting of said property be available and that depletion of the assets by the defendants and their agents be precluded, and further, such action will prevent innocent third parties from entangling themselves in the forfeiture and collection process.

6. The United States may suffer irreparable harm if a restraining order is not entered because the defendants, or their agent may sell, alienate, encumber, transfer or otherwise place the

above-described property beyond forfeitable condition and thereby frustrate the ends of public justice.

7. The defendant JENKINS sold and disposed of her interests in **Arcade News, Bellaire News, Doc Johnsons,** and **Diner's News,** memorialized in an Asset Purchase And Sale Agreement, attached hereto as Exhibit 1. That agreement sets out a weekly payment schedule, payments on which are still being made at the present time from HIHOUSTON, Inc. a duly chartered Texas corporation, with its registered office at 100 N.E. Loop 410, Suite 1070, in the City of San Antonio, County of Bexar, State of Texas, referred to in the agreement as the 'buyer".

8. This motion was originally filed under Miscellaneous Case Number 91-246 on April 9, 1991, following the return of this indictment under seal. The Honorable Lynn Hughes denied the motion without prejudice.

WHEREFORE, the government requests that the Court reconsider this motion and enter an order:

1. Prohibiting the individual defendants, and listed corporations and entities, their servants, employees, attorneys, and those persons in active concert or participation with them from selling, assigning, or transferring or removing from the jurisdiction of this Court without prior approval of the court and upon notice to the United States with an opportunity for the United States to be heard, any right, title, or interest in or related accounts of any kind, purpose or nature maintained at any bank or financial institution wherever located, whether foreign or domestic or any assets from, belonging to, or owed to the corporations or entities known as:

A. Mustatara Investments, N.V. (Mustatara), a foreign holding company in the Netherlands Antilles;

B. Jabar, Limited (Jabar), a foreign holding company in the Bahamas;

C. Phoenix and Associates Management, Ltd. (Phoenix Management), a Nevada corporation, formerly operating as Ibron Industries, Inc., a California corporation, and Praxis Management Company, a California corporation;

D. Saxet Management, Inc. (Saxet Management), a Texas corporation, doing business as **World News,** an adult bookstore/video arcade at 3305 East Highway 80, Abilene, Texas and **Talk of the Town,** an adult bookstore/video arcade at 321 Linda Drive, San Marcos, Texas;

E. Saxet, Inc. (Saxet), a Georgia corporation, doing business as **Bellaire News,** an adult bookstore/video arcade at 5807 Bellaire Boulevard, Houston, Texas; **Arcade News,** an adult bookstore/video arcade at 5821 Hillcroft, Houston, Texas; and **Doc Johnson's Arcade,** an adult bookstore/video arcade at 6431 Hillcroft, Houston, Texas;

F. La Grange Trading Company (La Grange Trading), a California corporation, doing business as **Diner's News,** an adult bookstore/video arcade at 240 Westheimer, Houston, Texas; **Apollo** News, an adult bookstore/video arcade at 2376 Austin Highway, San Antonio, Texas; **Pleasure Shoppe,** an adult bookstore/video arcade at 603 West Oltorf, Austin, Texas; and **Airline Book Store,** an adult bookstore/video arcade at 1824 Airline Highway, Kenner, Louisiana;

G. Lamar Avenue Books, Inc. (Lamar Avenue Books), a Tennessee corporation, doing business as **Cherokee Theater,** an adult bookstore/video arcade at 2747 Lamar Avenue, Memphis, Tennessee;

H. East Brooks Books, Inc. (East Brooks Books), a Tennessee corporation, doing business as **Airport Theater,** an adult bookstore/video arcade at 2214 East Brooks Road, Memphis, Tennessee, and **Get Well Bookmart,** an adult bookstore/video arcade at 1275 Get Well Road, Memphis, Tennessee;

I. Business Financial Services, Inc. (Business Financial Services), a Georgia corporation, doing business as **West Knoxville News,** an adult bookstore/video arcade at 5005 Kingston Pike, Knoxville, Tennessee;

J. Anwar Enterprises, Inc. (Anwar Enterprises), an Alabama corporation, doing business as **Birmingham Books,** an adult bookstore/video arcade at 7610 First Avenue North, Birmingham, Alabama;

K. Western Adult Enterprises, Inc. (Western Adult Enterprises), an Alabama corporation, doing business as **Alabama Adult Books,** an adult bookstore/video arcade at 901 Fifth Avenue North, Birmingham, Alabama;

L. Richland Bookmart, Inc. (Richland Bookmart), a South Carolina corporation, doing business as **Town and Country,** an adult bookstore/video arcade at 7011 Clinton Highway, Knoxville, Tennessee;

M. Sommer Avenue Books, Inc. (Sommer Avenue Books), a Tennessee corporation, doing business as **Paris Theater,** an adult bookstore/video arcade at 2432 Sommer Avenue, Memphis, Tennessee;

N. Stuart Services Company (Stuart Services), a Nevada corporation;

O. Jabar Leasing Company, Ltd. (Jabar Leasing), a California corporation;

P. Sixth Ray, Inc. (Sixth Ray), a Georgia corporation, doing business as **Unique Beauty Supply** in the state of Georgia;

2. Prohibiting the individual defendants, and listed corporations and entities, their servants, employees, attorneys, and those persons in active concert or participation with them from selling, assigning, or transferring or removing from the jurisdiction of

this Court without prior approval of the court and upon notice to the United States with an opportunity for the United States to be heard, any right, title, or interest in or any assets from, belonging to, or owed to JENKINS relating to the vehicle referred to in the forfeiture allegations contained in the indictment.

3. Prohibiting the individual defendants, and listed corporations and entities, their servants, employees, attorneys, and those persons in active concert or participation with them from selling, assigning, or transferring or removing from the jurisdiction of this Court without prior approval of the court and upon notice to the United States with an opportunity for the United States to be heard, any right, title, or interest in or any assets from, belonging to, or owed to JENKINS relating to the real property referred to in the forfeiture allegations contained in the indictment.

4. The government further moves this Court that it order that the United States Marshall [sic] Service be allowed access to the aforementioned corporations, and their books and records periodically and at all reasonable times without prior notice to assure that the order sought herein is being complied with and, to this end, that the defendants and their agents cooperate with and provide the information and all the supporting documents necessary for the United States Marshall [sic] Service to discharge their duties.

5. The government further moves this Court to order the defendants and corporations named in the forfeiture allegations of this indictment to comply in all respects with all provisions of this restraining order including maintaining all property in accordance with this order, maintaining insurance on all properties and providing information and cooperating with respect to all matters contained herein, and to abstain from using the above-described properties and enterprises in any way to violate any state, federal or local laws.

6. The government further moves this Court to order the Defendants to refrain from taking any actions in the normal conduct of their business that would not be considered standard, normal business practices of a reasonable and prudent business person.

7. The government further moves this Court to order the "buyer" or his successors and assigns referred to in the Asset Purchase And Sale Agreement with respect to the sale by defendant JENKINS of her interests in **Arcade News, Bellaire News, Doc Johnsons** and **Diners News** pay the periodic amounts due on the note as reflected on the payment schedule included therein to the United States Marshalls [sic] Service, to be held by them for the period of the order and until such time as the proceeds of the note become forfeitable upon conviction.

8. The government further moves this court to order that the original ex parte motion for restraining order, this amended motion for restraining order, and the orders signed by this Court related to these motions be sealed, and that no person shall have access to same except the Clerk or his designated deputies, attorneys for the United States, and authorized representatives of the Federal Bureau of Investigation, Internal Revenue Service and U.S. Marshal Service.

Respectfully submitted,

RONALD G. WOODS
United States Attorney

/s/Jay T. Karahan
JAY T. KARAHAN
Assistant United States Attorney

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NUMBER:

UNITED STATES OF AMERICA

V.

MARY JANE JENKINS
a/k/a MARIJANE JACKSON
a/k/a LYNDA GRAY ENTRATTER
a/k/a LYNDA IVEY

EVAN PETER PIGMAN
a/k/a PETE PIGMAN

JO ANN ROCHELLI

DAVID CARL STUBBS

RICKIE HERBERT RANNEY
a/k/a RICK RANNEY

ROBERT EUGENE SMITH

CHARLES WILLIAM BOYLE

LARRY WAYNE MALADY

INDICTMENT

THE GRAND JURY CHARGES THAT:

At all times material to this Indictment:

THE ENTERPRISE

1. The defendants MARY JANE JENKINS a/k/a MARIJANE JACKSON a/k/a LYNDA GRAY ENTRATTER a/k/a LYNDA IVEY, EVAN PETER PIGMAN, a/k/a PETE PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS, RICKIE

HERBERT RANNEY a/k/a RICK RANNEY, LARRY WAYNE MALADY and the following unindicted corporate entities:

A. Mustatara Investments, N.V. (Mustatara), a foreign holding company in the Netherlands Antilles;

B. Jabar, Limited (Jabar), a foreign holding company in the Bahamas;

C. Phoenix and Associates Management, Ltd. (Phoenix Management), a Nevada corporation, formerly operating as Ibron Industries, Inc., a California corporation, and Praxis Management Company, a California corporation;

D. Saxet Management, Inc. (Saxet Management), a Texas corporation, doing business as **World News,** an adult bookstore/video arcade at 3305 East Highway 80, Abilene, Texas and **Talk of the Town,** an adult bookstore/video arcade at 321 Linda Drive, San Marcos, Texas;

E. Saxet, Inc. (Saxet), a Georgia corporation, doing business as **Bellaire News,** an adult bookstore/video arcade at 5807 Bellaire Boulevard, Houston, Texas; **Arcade News,** an adult bookstore/video arcade at 5821 Hillcroft, Houston, Texas; and **Doc Johnson's Arcade,** an adult bookstore/video arcade at 6431 Hillcroft, Houston, Texas;

F. La Grange Trading Company (La Grange Trading), a California corporation, doing business as **Diner's News,** an adult bookstore/video arcade at 240 Westheimer, Houston, Texas; **Apollo** News, an adult bookstore/video arcade at 2376 Austin Highway, San Antonio, Texas; **Pleasure Shoppe,** an adult bookstore/video arcade at 603 West Oltorf, Austin, Texas; and **Airline Book Store,** an adult bookstore/video arcade at 1824 Airline Highway, Kenner, Louisiana;

G. Lamar Avenue Books, Inc. (Lamar Avenue Books), a Tennessee corporation, doing business as **Cherokee Theater,**

an adult bookstore/video arcade at 2747 Lamar Avenue, Memphis, Tennessee;

H. East Brooks Books, Inc. (East Brooks Books), a Tennessee corporation, doing business as **Airport Theater,** an adult bookstore/video arcade at 2214 East Brooks Road, Memphis, Tennessee, and **Get Well Bookmart,** an adult bookstore/video arcade at 1275 Get Well Road, Memphis, Tennessee;

I. Business Financial Services, Inc. (Business Financial services), a Georgia corporation, doing business as **West Knoxville News,** an adult bookstore/video arcade at 5005 Kingston Pike, Knoxville, Tennessee;

J. Anwar Enterprises, Inc. (Anwar Enterprises), an Alabama corporation, doing business as **Birmingham Books,** an adult bookstore/video arcade at 7610 First Avenue North, Birmingham, Alabama;

K. Western Adult Enterprises, Inc. (Western Adult Enterprises), an Alabama corporation, doing business as **Alabama Adult Books,** an adult bookstore/video arcade at 901 Fifth Avenue North, Birmingham, Alabama;

L. Richland Bookmart, Inc. (Richland Bookmart), a South Carolina corporation, doing business as **Town and Country,** an adult bookstore/video arcade at 7011 Clinton Highway, Knoxville, Tennessee;

M. Sommer Avenue Books, Inc. (Sommer Avenue Books), a Tennessee corporation, doing business as **Paris Theater,** an adult bookstore/video arcade at 2432 Sommer Avenue, Memphis, Tennessee;

N. Stuart Services Company (Stuart Services), a Nevada corporation;

O. Jabar Leasing Company, Ltd. (Jabar Leasing), a California corporation;

P. Sixth Ray, Inc. (Sixth Ray), a Georgia corporation, doing business as **Unique Beauty Supply** in the state of Georgia; and others known and unknown to the Grand Jury, in Houston, Texas, constituted an enterprise as defined by Title 18, United States Code, Section 1961(4), namely, corporations and individuals associated in fact (hereinafter referred to as the enterprise), whose leaders, members and associates engaged in various activities in the Southern District of Texas and elsewhere, including:

(1) The transportation in interstate commerce of obscene magazines and videotape recordings, in violation of Title 18, United States Code, Sections 2, 1462 and 1465;

(2) The operation of adult bookstores and video arcades which sold and distributed obscene magazines, and which publicly displayed obscene videotape recordings in peep shows for a profit, in violation of Section 43.23 of the Texas Penal Code.

* * *

COUNT ONE (RICO)

THE GRAND JURY CHARGES THAT:

1. Introductory paragraphs 1 through 3 of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. From in or about June of 1978 and continuously thereafter up to and including the date of this Indictment, within the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, the defendants MARY JANE JENKINS, EVAN PETER PIGMAN, J0 ANN ROCHELLI, DAVID CARL STUBBS, RICKIE HERBERT RANNEY, LARRY WAYNE MALADY and others both known and unknown to the Grand Jury, being persons employed by and

associated with the criminal enterprise, did unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise the activities of which affected interstate and foreign commerce, through a pattern of racketeering activity, in violation of Title 18, United States Code, Section 1962(c).

RACKETEERING ACTS

3. The pattern of racketeering activity as defined by Title 18, United States Code, Sections 1961(1)(A), 1961(1)(B), and 1961(5) consisted of the following:

RACKETEERING ACT ONE

In or about March of 1986, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendant MARY JANE JENKINS and LARRY WAYNE MALADY did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of an obscene, lewd, lascivious, and filthy book, pamphlet, picture, paper, writing, print, drawing, figure, image and other matter of indecent and immoral character, namely, a magazine entitled **"Bitch In Heat,"** which was transported by said common carrier from Los Angeles, California to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT TWO

In or about June of 1986, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendant MARY JANE JENKINS and LARRY WAYNE MALADY did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of an obscene, lewd, lascivious, and filthy book, pamphlet, picture, paper, writing, print, drawing, figure, image and other matter of indecent and

immoral character, namely, a magazine entitled **"Hot 'N' Juicy,"** which was transported by said common carrier from Cleveland, Ohio, to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT THREE

In or about November of 1986, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendant MARY JANE JENKINS, did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of an obscene, lewd, lascivious, and filthy book, pamphlet, picture, paper, writing, print, drawing, figure, image and other matter of indecent and immoral character, namely, a magazine entitled **"Lusty Lady,"** which was transported by said common carrier from Los Angeles, California to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT FOUR

In or about May of 1987, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, and JO ANN ROCHELLI, each aiding and abetting one another, did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of an obscene, lewd, lascivious, and filthy book, pamphlet, picture, paper, writing, print, drawing, figure, image and other matter of indecent and immoral character, namely, a magazine entitled **"3-Way Cum, A Gourmet Special #14,"** which was transported by said common carrier from Los Angeles, California, to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT FIVE

In or about July of 1987, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, and JO ANN ROCHELLI, each aiding and abetting one another, did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of an obscene, lewd, lascivious, and filthy book, pamphlet, picture, paper, writing, print, drawing, figure, image and other matter of indecent and immoral character, namely, a magazine entitled **"Stroke, White Trash Token Bisexuals,"** which was transported by said common carrier from Cleveland, Ohio, to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT SIX

On or about June 7, 1988, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS, and RICKIE HERBERT RANNEY, each aiding and abetting one another, did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of obscene, lewd, lascivious and filthy pictures, motion picture films, electrical transcriptions and other matter of indecent character, namely, videotape recordings entitled **"EuroStars II," "Full Load," "Black Bullet," "Extreme Urge," "Irresistible," "Sex Lies," "Suzy Cue," "Employee's Revenge"** and **"Cum Shot Review, Volume I,"** which were transported by said common carrier from Cleveland, Ohio, to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT SEVEN

On or about June 14, 1988, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS, and RICKIE HERBERT RANNEY, each aiding and abetting one another, did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of obscene, lewd, lascivious and filthy pictures, motion picture films, electrical transcriptions and other matter of indecent character, namely, videotape recordings entitled **"Cum Shot Review, Volume 4," "Full Metal Bikini," "The Raincoat Crowd," "The Godmother, Part I," "Casing the Crack," "That's Erotic," "Introducing Kascha," "The Girls of Ball Street," "Two Into One," "Male Stampede," "The Golden Boys"** and **"Black Mistress Supreme,"** which were transported by said common carrier from Cleveland, Ohio, to Houston, Texas [VIOLATION: Title 18, United States Code, Sections 1462 and 2]

RACKETEERING ACT EIGHT

On or about June 21, 1988, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS and RICKIE HERBERT RANNEY, each aiding and abetting one another, did knowingly use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of obscene, lewd, lascivious and filthy pictures, motion picture films, electrical transcriptions and other matter of indecent character, namely, videotape recordings entitled **"Latin Tri-Sexual Encounters, No. 8," "Soul and Salsa," "Thinking Big," "Double Agents," "A Girl Named Sam," "Euro Stars I," "Only the Strong Survive"** and **"Anal**

Pleasures," which were transported by said common carrier from Cleveland, Ohio, to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2

RACKETEERING ACT NINE

On or about June 28, 1988, in the Houston Division of the Southern District of Texas and elsewhere, and within the jurisdiction of this Court, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, JO ANN ROCHELLI, DAVID CARL STUBBS and RICKIE HERBERT RANNEY, each aiding and abetting one another, did use and aid and abet the use of a common carrier, namely, United Parcel Service, for the carriage in interstate commerce of obscene, lewd, lascivious and filthy pictures, motion picture films, electrical transcriptions and other matter of indecent character, namely, videotape recordings entitled **"In The Raw," "Good Jac 2," "Babes in Joyland," "Hot Rods"** and **"Mrs. Rodgers' Neighborhood,"** which were transported by said common carrier from Cleveland, Ohio, to Houston, Texas. [VIOLATION: Title 18, United States Code, Sections 1462 and 2].

RACKETEERING ACT TEN

On or about July 13, 1988, within the Southern District of Texas, defendants MARY JANE JENKINS, EVAN PETER PIGMAN, JO ANN ROCHELLI and LARRY WAYNE MALADY did unlawfully, knowingly, and intentionally cause the wholesale promotion of obscene material at Diner's News in Houston, Harris County, Texas, to include four obscene magazines the content and character of which they well knew, namely, **"Anal Cum;" "First Time Fuck, Vol. I;" "Knocked Up and Horney"** and **"Man Eaters, Collectors Edition, No. 18,"** in violation of Section 43.23, Texas Penal Code, an act of racketeering involving dealing in obscene matter, as defined in Title 18, United States Code, Section 1961(1)(A).

* * *

FORFEITURE ALLEGATIONS

1. Introductory paragraphs 1 through 3 of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. Counts One and Two of this Indictment are realleged and incorporated by reference as though fully set forth herein for the purpose of alleging forfeiture pursuant to Title 18, United States Code, Section 1963.

3. Through the aforesaid pattern of racketeering activity, the defendant JENKINS has from in or about March of 1986 to on or about July 13, 1988 acquired and maintained interests in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1) and are further described as follows:

A. All interests in, assets of or proceeds from the sale or disposition of:

(1) Mustatara Investments, N.V. (Mustatara), a foreign holding company in the Netherlands Antilles;

(2) Phoenix and Associates Management, Ltd. (Phoenix Management), a Nevada corporation, formerly operating as Ibron Industries, Inc., a California corporation, and Praxis Management Company, a California corporation;

(3) Sixth Ray, Inc. (Sixth Ray), a Georgia corporation, doing business as **Unique Beauty Supply.**

(4) Jabar, Limited (Jabar), a foreign holding company in the Bahamas;

(5) Saxet Management, Inc. (Saxet Management), a Texas corporation, doing business as **World News,** an adult bookstore/video arcade at 3305 East Highway 80, Abilene,

Texas and **Talk of the Town**, an adult bookstore/video arcade at 321 Linda Drive, San Marcos, Texas;

(6) Saxet, Inc. (Saxet), a Georgia corporation, doing business as **Bellaire News**, an adult bookstore/video arcade at 5807 Bellaire Boulevard, Houston, Texas; **Arcade News,** an adult bookstore/video arcade at 5821 Hillcroft, Houston, Texas; and **Doc Johnson's Arcade**, an adult bookstore/video arcade at 6431 Hillcroft, Houston, Texas;

(7) La Grange Trading Company (La Grange Trading), a California corporation, doing business as **Diner's News,** an adult bookstore/video arcade at 240 Westheimer, Houston, Texas; **Apollo News**, an adult bookstore/video arcade at 2376 Austin Highway, San Antonio, Texas; **Pleasure Shoppe,** an adult bookstore/video arcade at 603 West Oltorf, Austin, Texas; and **Airline Book Store,** an adult bookstore/video arcade at 1824 Airline Highway, Kenner, Louisiana;

(8) Lamar Avenue Books, Inc. (Lamar Avenue Books), a Tennessee corporation, doing business as **Cherokee Theater,** an adult bookstore/video arcade at 2747 Lamar Avenue, Memphis, Tennessee;

(9) East Brooks Books, Inc. (East Brooks Books), a Tennessee corporation, doing business as **Airport Theater,** an adult bookstore/video arcade at 2214 East Brooks Road, Memphis, Tennessee, and **Get Well Bookmart,** an adult bookstore/video arcade at 1275 Get Well Road, Memphis, Tennessee;

(10) Business Financial Services, Inc. (Business Financial Services), a Georgia corporation, doing business as **West Knoxville News**, an adult bookstore/video arcade at 5005 Kingston Pike, Knoxville, Tennessee;

(11) Anwar Enterprises, Inc. (Anwar Enterprises), an Alabama corporation, doing business as **Birmingham Books,**

an adult bookstore/video arcade at 7610 First Avenue North, Birmingham, Alabama,

(12) Western Adult Enterprises, Inc. (Western Adult Enterprises), an Alabama corporation, doing business as **Alabama Adult Books,** an adult bookstore/video arcade at 901 Fifth Avenue North, Birmingham, Alabama;

(13) Richland Bookmart, Inc. (Richland Bookmart), a South Carolina corporation, doing business as **Town and Country,** an adult bookstore/video arcade at 7011 Clinton Highway, Knoxville, Tennessee;

(14) Sommer Avenue Books, Inc. (Sommer Avenue Books), a Tennessee corporation, doing business as **Paris Theater,** an adult bookstore/video arcade at 2432 Summer Avenue, Memphis, Tennessee;

(15) Stuart Services Company (Stuart Services), a Nevada corporation;

(16) Jabar Leasing Company, Ltd. (Jabar Leasing), a California corporation;

B. The following vehicle or, if sold, the proceeds therefrom:

(1) One 1987 Nissan 300ZX coupe, VIN JNlCZ1452HX150668, registered to Gelco Corporation/Lynda Entratter, 605 Old Ballas Road, St. Louis, Missouri 63141.

C. The following bank accounts and all funds credited to the accounts as of the date of this indictment:

BANK	ACCOUNT NAME	ACCOUNT NO.
Sunburst Bank Southhaven, Mississippi	Sommer Avenue Books, Inc.	4038203
Sunburst Bank Southhaven, Mississippi	Sommer Avenue Books, Ins. Special Account	4041382
Sunburst Bank Southhaven Mississippi	East Brooks Books, Inc.	4038214
Sunburst Bank Southhaven, Mississippi	East Brooks Books, Inc.	4038225
Sunburst Bank Southhaven, Mississippi	Lamar Avenue Books, Inc.	4038192
Third National Bank Knoxville, Tennessee	Town & Country	22041313
Third National Bank Knoxville, Tennessee	Business Financial Services, Inc., DBA West Knoxville News	05524504
NCNB Texas National Bank Abilene, Texas	Stuart Services, Inc.	3620176273
NCNB Texas National Bank Abilene, Texas	North 3rd	362013164

Merchants Bank Kenner, Louisiana	La Grange Trading Co. DBA Airline Bookstore	67843
The Boatmen's National Bank St. Louis, Missouri	Phoenix & Associates Management, Ltd.	350119022318
First Bank St. Louis, Missouri	Jabar Leasing Co., Ltd.	6956200
Etowah Bank Canton, Georgia	Jabar Leasing Co., Ltd.	0072175
Colonial Bank St. Louis, Missouri	Alabama Books & Western Adult Enterprises	0503041101
Colonial Bank St. Louis, Missouri	Anwar Enterprises DBA Birmingham Books	0502839901
Turks and Caicos Banking Company, Ltd. Grand Turk Turks and Caicos Islands West Indies	Mustatara Investments, N.V.	7320010G847

D. The following personal property and the proceeds therefrom:

(1) approximately $33,880.97 cash seized by agents of the Federal Bureau of Investigation from the safe in STUBB'S warehouse, 7397 Ashcroft, Houston, Texas on June 30, 1988;

(2) cashiers check and the proceeds therefrom seized by agents of the Federal Bureau of Investigation from the safe in STUBB'S warehouse, 7397 Ashcroft, Houston, Texas on June 30, 1988 as follows:

a. First National Bank, Paragould, Arkansas cashier's check #29542, 6/29/88, to Saxet Special Account in the amount of $1,500.00;

b. First National Bank, Paragould. Arkansas cashier's check #29544, 6/29/88, to White Fabricating Co. in the amount of $2,719.75;

c. First National Bank, Paragould, Arkansas cashier's check #29541, 6/29/88, to Concorde Development Co. in the amount of $2,000.00;

d. Colonial Bank, Birmingham, Alabama official cashier's check #314944155, 6/27/88, to Alabama Adult Books in the amount of $1,795.00;

e. Merchant's Bank, Kenner, Louisiana cashier's check #A138645, 6/27/88, to White Fabricating Co., Inc. in the amount of $3,856.50;

(3) approximately $9,033.18 seized by agents from the Federal Bureau of Investigation from a safe inside Arcade News Bookstore, 5821 Hillcroft, Houston, Texas on June 30, 1988.

E. The following real property and the proceeds therefrom:

(1) Lots 6 and 7 of Forest Park Addition and in Block No. 4907 A of the city of St. Louis, State of Missouri, having an aggregate front of 200 feet on the north line of said addition; bounded on the east by lot no. 5 and the west by lot no. 8 of said block and addition and south by Portland Place, together with all buildings, fixtures, and improvements thereon.

4. The defendant JENKINS further had an interest in, security of, claim against and property and contractual rights which afforded a source of influence over the enterprise named herein which the defendant JENKINS established, operated, controlled,

conducted and participated in the conduct of in violation of Title 18, United States Code, Section 1962, and which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2). The United States' intent to forfeit includes, but is not limited to, the defendant JENKINS total interests in the assets or the proceeds thereof as set forth in Sections A, B, C, D, and E of Paragraph 3 of these forfeiture allegations, incorporated herein by reference.

5. Through the aforesaid pattern of racketeering activity, the defendant JENKINS had interests in, security of, claims against and property and contractual rights over the property described herein, all of which afforded a source of influence over the enterprise named herein which the defendant JENKINS established, operated, controlled, conducted and participated in the conduct of in violation of Title 18, United States Code, Section 1962, thereby making such property subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2).

6. The defendants further had property constituting, and derived from, any proceeds which the defendants obtained, directly or indirectly, from the aforesaid pattern of racketeering activity in violation of Title 18, United States Code, Section 1962, and which property is subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(3). The United States intent to forfeit includes, but is not limited to, the defendants interests in the assets and the proceeds thereof as set forth in Sections A, B, C, D, and E, of paragraph 3 of these forfeiture allegations, incorporated herein by reference.

7. Through the aforesaid pattern of racketeering activity, the defendants had property constituting and derived from any proceeds which the defendants obtained, directly and indirectly, from the racketeering activity herein which the defendants

established, operated, controlled, conducted and participated in the conduct of in violation of Title 18, United States Code, Section 1962, thereby making such property subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963 (a)(3).

A TRUE BILL:

_____

FOREPERSON OF THE
GRAND JURY

RONALD G. WOODS
United States Attorney
Southern District of Texas

By: _____
KAREN J. SURACI
Special Attorney
United States Department of Justice

_____
JAY T. KARAHAN
Assistant United States Attorney
Southern District of Texas

Supreme Court, U.S.
FILED
FEB 22 1993
OFFICE OF THE CLERK

No. 92-1130

In the Supreme Court of the United States

OCTOBER TERM, 1992

MARY JANE JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the "pattern of racketeering activity" and "enterprise" elements of RICO are unconstitutionally vague when applied to a business dealing in expressive materials.

2. Whether the post-trial forfeiture provisions of RICO violate the First or Eighth Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals, Pet. App. A1-A7, is reported at 974 F.2d 32.

JURISDICTION

The judgment of the court of appeals was entered on October 5, 1992. The petition for a writ of certiorari was filed on December 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. A grand jury sitting in the Southern District of Texas indicted petitioner on one count of conducting an enterprise through a pattern of racketeering

activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); and nine counts of transporting obscene material in interstate commerce, in violation of 18 U.S.C. 1462. The charged enterprise consisted of six persons, including petitioner, and 16 unindicted corporations, each of which was alleged to be controlled by petitioner and to be connected with the operation of "adult" bookstores and/or peep show video arcades. Except for two foreign holding companies, the corporations were scattered throughout the South. The indictment listed ten predicate acts of racketeering, nine of which corresponded to the substantive interstate transportation counts and one of which dealt with promoting obscene material under state law. The indictment sought forfeiture, under 18 U.S.C. 1963(a), of the 16 corporations, bank accounts belonging to several of the corporations, money seized in raids, and petitioner's automobile and residence. Pet. App. A37-A53.

2. On April 10, 1991, the government obtained an *ex parte* restraining order, under 18 U.S.C. 1963(d), that prohibited petitioner, her five co-defendants, and the unindicted corporations from selling, assigning, transferring, encumbering, or removing from the jurisdiction of the court any assets owned by or owed to them. Pet. App. A13-A17. The order required that weekly payments to petitioner from the sale of four adult bookstores be turned over to the United States Marshals Service to be held until it could be determined whether they were forfeitable upon

conviction. *Id.* at A17-A18. It also directed petitioner to maintain the properties and "to abstain from using the * * * properties and enterprises in any way to violate any state, federal or local laws." *Id.* at A18. Finally, the order provided that:

> No person shall consider this Order as a restraint or prohibition to the carrying on of any lawful activity or business, and the above mentioned businesses and commercial establishments are not restrained or prohibited from operating any lawful businesses in a normal business manner, including the payment of salaries, outstanding debts, and liabilities that exist as of the date of the filing of this Order, as long as the normal conduct of business does not dissipate or diminish the value, as of April 9, 1991, of the assets, properties, and interests subject to forfeiture to the government. Nothing in this Order shall be construed to restrain the dissemination of visual or printed matter, nor to condone the illegal sale or distribution of obscene material.

Id. at A19.

3. Thereafter, petitioner moved that the restraining order be lifted, arguing that RICO's substantive provisions and its forfeiture and restraining order provisions violate the First Amendment as applied to persons charged with selling obscene material. After a hearing, the district court rejected petitioner's challenge to the restraining order. Pet. App. A8-A11. In so doing, the court explained that it had "fashioned its order sufficiently narrow[ly] such that the defendant may continue in the business of selling constitu-

tionally protected materials." *Id.* at A10. The court added that "[u]nder the terms of the Court's order, the defendant has continued conducting business. There is no evidence that the businesses have not been able to pay their bills as a result of this order, or to otherwise conduct the businesses' day-to-day operations." *Ibid.* The court held that "[t]he fact that the defendants are more cautious about the products that they are selling is not prior restraint. It is against the law to sell obscene materials. That fact alone is sufficient reason to pause and be cautious." *Ibid.* The court also held that "[t]he First Amendment is not implicated by the restraint from sale or use of personal or real property that is derived from First Amendment activities." *Id.* at A11. The court explicitly reserved its ruling on petitioner's challenges to the constitutionality of the RICO statute. *Ibid.*

4. On appeal, the court of appeals held, first, that the district court's order refusing to lift the restraining order was immediately appealable. Nonetheless, the court declined to address petitioner's constitutional challenges to the RICO statute, stating that, "[a]s a general rule, courts of appeals should conduct only a limited review in interlocutory appeals, and should address only the propriety of the order that gave rise to the appeal." Pet. App. A3. The court explained that, in order to resolve petitioner's challenges to the RICO statute, it would have to act "without the benefit of a complete record, specialized findings of fact, and the reasoned judgment of the district court." *Id.* at A4. After noting that the issue of the constitutionality of RICO's forfeiture and restraining order provisions is before this Court in

Alexander v. *United States*, cert. granted, 112 S. Ct. 3024 (1992) (No. 91-1526) (argued Jan. 12, 1993), the court concluded that "[w]isdom dictates that we await the Supreme Court's teaching." Pet. App. A4.

The court of appeals then rejected petitioner's claim that the restraining order unconstitutionally authorized the seizure of presumptively protected expressive material without a prior judicial determination of obscenity. The court explained that the restraining order "did not effect * * * a seizure," since, "[a]s the Government conceded at oral argument, [it] does not interfere with the sale even of obscene materials." Pet. App. A4-A5.

The court of appeals also rejected petitioner's contention that the restraining order is invalid because it directs the seizure of funds and the payment of certain money received to the United States Marshals Service. While acknowledging that "restraints on the use of funds might under some circumstances improperly impede a defendant's ability to exercise First Amendment rights," the court held that "there is nothing to indicate that this has occurred in the instant case." Pet. App. A5. The court explained that there was no evidence that the restraining order had affected petitioner's ability to carry on her businesses. *Ibid.*

Additionally, the court of appeals held that the issuance of the *ex parte* restraining order did not deny petitioner procedural due process. The court explained that the *ex parte* procedure was necessary in order to prevent petitioner from detrimentally affecting the government's interest in forfeitable property. Pet. App. A6. The court also took note of

the fact that petitioner had received a judicial hearing on her motion to dissolve the restraining order. *Ibid.*

Finally, the court of appeals held that the restraining order does not impermissibly bind unindicted corporations. In so holding, the court invoked 18 U.S.C. 1963(d)(1), which explicitly permits courts to "take any other other action" deemed necessary "to preserve the availability of property" subject to forfeiture. Pet. App. A6. The court observed that, under the indictment, the corporations "are not innocent, unrelated third parties, but rather are an integral part of the criminal enterprise and under [petitioner's] total and exclusive control." *Id.* at A7.[1]

ARGUMENT

1. The RICO statute makes it a crime to participate in the conduct of an "enterprise" through a "pattern of racketeering activity." 18 U.S.C. 1962(c). Petitioner contends that the restraining order entered in this case must be lifted, not because the order is itself unconstitutionally vague, but because the statutory "pattern of racketeering" and

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[1] Approximately one month before the court of appeals rendered its decision, the district court entered an order suppressing evidence on the ground that it was obtained in violation of the Fourth Amendment. Without the suppressed evidence, the government cannot proceed with the prosecution. The government is currently deciding whether to appeal the suppression order. In the meantime, petitioner has not asked the district court to lift the restraining order, and the district court has not done so. Because of the possibility of a successful government appeal from the suppression order, the issue of the legality of the restraining order is not moot.

"enterprise" elements of RICO are unconstitutionally vague as applied to obscenity offenses. Pet. 9-21.

a. As an initial matter, petitioner's challenge to the constitutionality of 18 U.S.C. 1962(c) is premature. Both courts below declined to address the issue. Although the court of appeals held that it had jurisdiction to conduct an interlocutory review of the propriety of the restraining order, the court expressly refused to address claims that went beyond the legality of the restraining order and challenged the validity of the underlying RICO counts themselves. That approach was in keeping with clear congressional intent. The Senate report pertaining to the RICO restraining order forfeiture provisions indicates that, in authorizing the government to obtain a post-indictment restraining order without prior notice or a hearing, Congress did not intend to deprive the district court of authority to hold a hearing on the validity of the order after its entry. S. Rep. No. 225, 98th Cong., 1st Sess. 203 (1983). The Senate report emphasizes, however, that "at such a hearing the court is not to entertain challenges to the validity of the indictment." *Ibid.* See *United States* v. *Thier*, 801 F.2d 1463, 1469-1470 (1986), modified on other grounds, 809 F.2d 249 (5th Cir. 1987).[2]

[2] A defendant may not take an interlocutory appeal from the denial of a pretrial motion challenging the constitutionality of the statute under which he is charged even though the charge may have resulted in a restraint on his liberty. Accordingly, there is nothing unusual in barring a defendant from attacking such a statute on an interlocutory appeal from the issuance of a pretrial restraining order, which only restrains a defendant's ability to transfer or remove property that is alleged to be the subject of criminal forfeiture.

Petitioner's challenge to the constitutionality of 18 U.S.C. 1962(c)—which if valid would require dismissal of the RICO counts in the indictment—is precisely the type of claim Congress sought to foreclose at this juncture. If petitioner's case goes to trial, she is convicted on a RICO count, and that conviction is upheld on appeal, she may then raise her vagueness claim in this Court.

b. In any event, petitioner's vagueness claim fails on the merits. Absent First Amendment considerations, a defendant cannot challenge a statute for vagueness on the ground that there is some uncertainty regarding the full reach of the law in marginal cases not before the court. Rather, the defendant must show that the law is vague as applied to the particular conduct with which he is charged. See, *e.g.*, *Chapman* v. *United States*, 111 S. Ct. 1919, 1929 (1991). In this case, no First Amendment interest is affected, since the underlying statutes incorporate the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15 (1973).[3] Under these circumstances, the RICO statute does not reach constitutionally protected conduct, and a facial challenge to that statute cannot succeed. See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 57-58

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[3] The Court in *Miller* adopted the following three-part definition of obscenity: (1) the average person applying contemporary community standards would find that the work taken as a whole appeals to the prurient interest; (2) the work depicts or describes in a patently offensive way sexual conduct specifically defined by the applicable state law; (3) the work taken as a whole lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

(1989); *Adult Video Ass'n* v. *Barr*, 960 F.2d 781, 787-788 (9th Cir. 1992), petition for cert. pending (on other grounds), No. 92-773. As this Court noted in *Miller*, "[i]f a state law that regulates obscene material is [limited according to the *Miller* standards] * * * First Amendment values * * * are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25.

c. The RICO statute defines a "pattern of racketeering activity" as requiring at least two predicate racketeering acts within a ten-year period. 18 U.S.C. 1961(5). State and federal obscenity offenses qualify as racketeering acts. 18 U.S.C. 1961(1) (A) and (B). In *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989), this Court explained that "to prove a pattern of racketeering activity a plaintiff or prosecutor must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." The requisite relatedness of predicate acts is established, among other ways, by showing that each act furthered the goals of the same enterprise. See, *e.g.*, *United States* v. *Phillips*, 664 F.2d 971, 1011-1012 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Weisman*, 624 F.2d 1118, 1122 (2d Cir.), cert. denied, 449 U.S. 871 (1980). Continuity is established by proving "a series of related predicates extending over a substantial period of time" or by showing that "the predicate acts or offenses are part of an ongoing entity's regular way of doing business." *H.J. Inc.*, 492 U.S. at 242.

In this case, the indictment charges that, during a two-year period, petitioner committed at least ten predicate offenses involving the shipment or promotion of obscene material. Each offense occurred in Houston as part of petitioner's ongoing pornography business. Because petitioner's multiple obscenity offenses advanced the cause of a single, ongoing enterprise engaged in the transportation, distribution, and sale of obscene material, there can be no serious contention that petitioner lacked notice that she was engaging in a pattern of racketeering activity. See *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972) (to sustain a vagueness attack, the defendant must show that the statute fails to give a person of ordinary intelligence notice that his conduct is forbidden).

Petitioner argues that the RICO statute is impermissibly vague when the alleged predicate acts are obscenity offenses, because sexually explicit material is presumed to be nonobscene until it is judicially held to be otherwise. Pet. 13-16. This Court rejected precisely the same claim in *Fort Wayne Books, Inc.* v. *Indiana*, *supra*. There, the Court considered the constitutionality of a state RICO statute that was indistinguishable in any pertinent respect from the federal RICO statute at issue here. Previously, this Court in *Miller* had adopted a test for obscenity in order to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." 413 U.S. at 27. Because the state RICO statute at issue in *Fort Wayne Books* "totally encompasse[d] the [state] obscenity law," 489 U.S. at 58, and passed muster

under *Miller*, this Court in *Fort Wayne Books* viewed the defendant's vagueness claim as foreclosed by *Miller*. 489 U.S. at 57. Accordingly, the Court held that the state RICO law was not unconstitutionally vague when obscenity violations served as predicate offenses. *Id.* at 58. Indeed, the Court observed that, since "obscenity-related RICO prosecutions [are] possible only where one is guilty of a 'pattern' of obscenity violations[,] it would seem that the RICO statute is inherently *less* vague than any state obscenity law: a prosecution under the RICO law will be possible only where all the elements of an obscenity offense are present, and then some." *Id.* at 58-59 n.7. See *Adult Video Ass'n* v. *Barr*, 960 F.2d at 786.[4]

d. Nor is the enterprise element of a RICO offense unconstitutionally vague. The RICO statute defines an "enterprise" as including "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In *United States* v. *Turkette*, 452 U.S. 576, 583 (1981), the Court explained that an association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct." Here, the plain language of the statute put petitioner on notice that

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[4] Petitioner maintains that "[s]ince each and every book, magazine, motion picture or video is judged individually, the distribution of one sexually explicit and obscene item does not pose a threat of continued activity." Pet. 14. But a defendant who commits a series of obscenity violations over an extended time period as part of an ongoing pornography business, which is what petitioner is charged with having done here, does pose a threat of continued criminal activity—indeed, he has already engaged in such activity.

she, her co-defendants, and the unindicted corporations that she controlled constituted an association-in-fact enterprise engaged in the business of distributing adult books, magazines, and other material, as charged in the indictment. See *United States* v. *Hawes*, 529 F.2d 472, 479 (5th Cir. 1976) (enterprise element of RICO offense not unconstitutionally vague).

Petitioner argues that persons engaged in the distribution of sexually explicit material that has not yet been judicially held obscene "cannot know when that entity or some members became a criminal enterprise." Pet. 19. This Court rejected the same argument in *Fort Wayne Books*, as discussed above. Petitioner also misapprehends the distinction between a RICO enterprise and the predicate acts of racketeering. The enterprise is an "ongoing organization, formal or informal," *Turkette*, 452 U.S. at 583. As such, "it is an entity separate and apart from the pattern of activity in which it engages." *Ibid.* Accordingly, the fact that the predicate acts charged against a RICO defendant are obscenity offenses has no bearing on the defendant's understanding of the enterprise element; the concept of a RICO enterprise does not change according to the nature of the predicate acts.[5]

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[5] Petitioner makes much of the point that, because an item can be adjudged obscene under *Miller* only in relation to the contemporary standards of the community in which the alleged offense was committed, "[a] [RICO] defendant or defendants must have activities in the particular judicial district in which the predicate obscenity charge is brought." Pet. 19-21. Whatever import that claim may have in other cases, it has none here, since petitioner is being prosecuted in the Southern

2. Petitioner contends that the restraining order must be lifted for the additional reason that the post-trial forfeiture provision of RICO, 18 U.S.C. 1963(a), violates the Constitution when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive material. Pet. 22-30. In particular, she argues that such RICO forfeitures constitute unlawful prior restraints on speech in violation of the First Amendment, and that they are disproportionate to the RICO offense in violation of the Eighth Amendment.[6]

Although the questions that petitioner raises regarding the constitutionality of 18 U.S.C. 1963(a) are currently before the Court in *Alexander* v. *United States*, *supra*, it is unnecessary for the Court to hold this petition pending its decision in that case. Just as

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District of Texas and the prosecution is based on alleged obscenity offenses committed within that district.

[6] In passing, petitioner also challenges the constitutionality of the "relation back" provision of the RICO statute, 18 U.S.C. 1963(c), pursuant to which "[a]ll right, title, and interest" in property subject to forfeiture under RICO "vests in the United States upon the commission of the act giving rise to forfeiture." Pet. 23-24. Petitioner argues that this provision allows the "pre-trial seizure" of protected material without a determination of obscenity. That claim lacks merit. Vesting title in the government from the time of the acts giving rise to forfeiture is not the same thing as a seizure; the government must still obtain a RICO conviction and prove the elements of forfeiture in order to obtain the property. The relation back provision merely ensures that the government's interest in the property subject to forfeiture is not extinguished in the period between the commission of the offense and judicial condemnation of the property.

both courts below correctly declined to address petitioner's challenge to the constitutionality of 18 U.S.C. 1962(c), so, too, those courts correctly declined to address petitioner's challenge to the constitutionality of the RICO forfeiture provision, 18 U.S.C. 1963(a), at this stage in the proceedings. Since petitioner's claim goes directly to the validity of several of the forfeiture allegations in the indictment, that claim was not properly raised by a motion to quash the restraining order, as discussed above. What is more, unless and until petitioner is convicted on a RICO count and any property is actually forfeited, petitioner's claim is premature, because it cannot be determined whether and to what extent any property will be forfeited. Following a conviction, if there is one, petitioner will have the opportunity to challenge the forfeiture on the grounds raised in this petition. Finally, the court of appeals made clear that it would defer any resolution of the questions that petitioner raises concerning the constitutionality of RICO's forfeiture provision until this Court has issued its decision in *Alexander*. Accordingly, there is no need to hold the petition pending the decision in *Alexander* in order to ensure that the Court's decision in that case will govern the ultimate outcome of this one.[7]

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[7] In *Adult Video Ass'n* v. *Barr*, *supra*, the Ninth Circuit held that RICO's pretrial restraint provision is facially unconstitutional because it authorizes the pretrial seizure of expressive materials without a judicial determination that they are obscene. 960 F.2d at 788. We filed a certiorari petition from the Ninth Circuit's decision (No. 92-773), asking this Court to hold the petition pending its decision in *Alexander* and to dispose of that petition as appropriate in light of the decision

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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in that case. That course is not appropriate in this case. Aside from the fact that the judgment in *Adult Video* was final (unlike the judgment below), petitioner does not raise the question resolved by the Ninth Circuit in *Adult Video*.